

No. 12547

United States
Court of Appeals
for the Ninth Circuit.

ADOLPH J. SCHNEE,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Appellee.

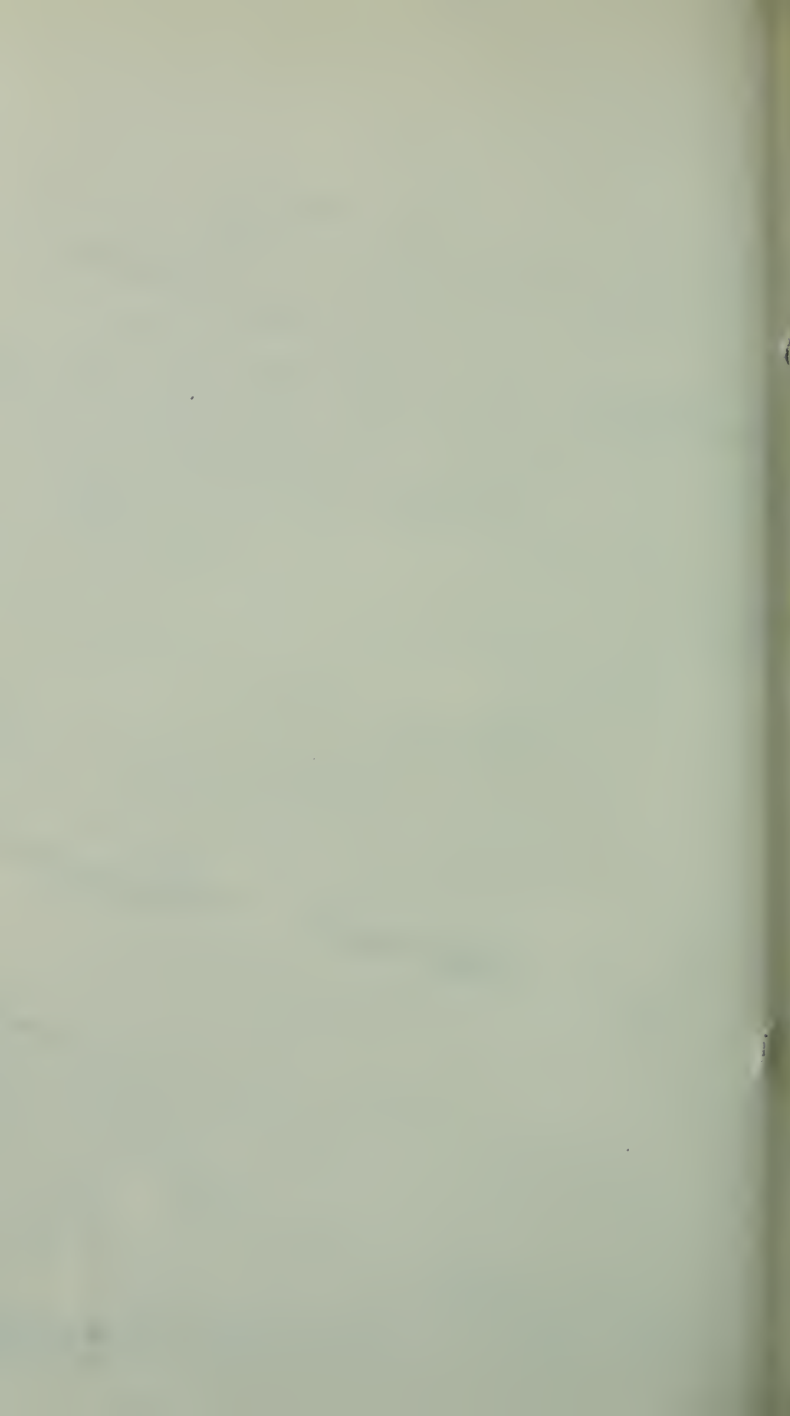
Transcript of Record

Appeal from the United States District Court,
District of Arizona.

FILED

JUL 24 1950

PAUL P. D'EBRIEN,
Clerk



No. 12547

United States
Court of Appeals
for the Ninth Circuit.

ADOLPH J. SCHNEE,

Appellant,

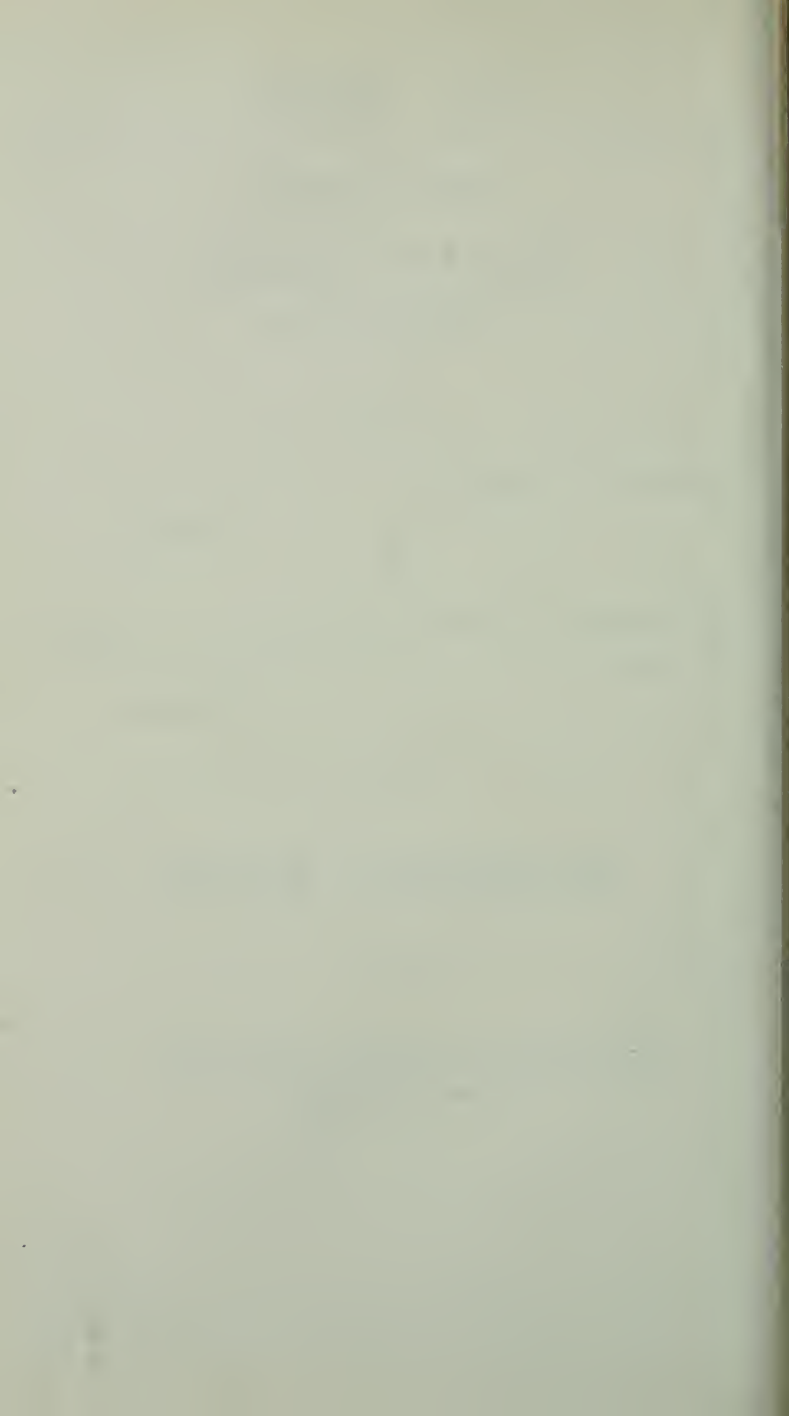
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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In the District Court of the United States
for the District of Arizona

Civil Docket No. 486—Tucson

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

FILINGS—PROCEEDINGS

1949

Jan. 3—File Record transferred from Northern
District of California.

Complaint.

Summons.

Stipulation Extending Time.

Answer.

Demand for Jury Trial.

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Jury Trial.

Notice of Time and Place of Trial.

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Rules 26 and 30 of Federal Rules of Civil
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Motion for Transfer.

Certified Copy of Order Granting Motion
for Change of Venue.

Clerk's Certificate.

June 23—Plaintiff's praecipe for entry of dismissal
by Clerk, filed at Phoenix.

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- June 24—Docket plaintiff's praecipe for dismissal.
Aug. 10—File defendant's motion to set.
Aug. 15—File Withdrawal of praecipe for dismissal.
Nov. 14—File Plaintiff's Motion to Set.

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- Jan. 9—File deposition of Adolph J. Schnee.
Feb. 15—On for trial setting. No appearance for plaintiff. Henderson for defendant. Order set for trial Feb. 28, 1950, at 10 a.m. (Counsel agree this case may be called first on calendar for 2/28 in lieu of Civ 398 Tuc.)
Feb. 16—Issue notice to counsel of trial setting.
Feb. 27—File Praecipe for subpoenas.
Feb. 27—Issue subpoenas (8).
Feb 28—File deposition of Henrietta Roher.
Feb. 28—On for trial. Leslie C. Gillen and Edward W. Scruggs, present for plaintiff. B. G. Thompson and A. Henderson for defendant. Order admit Leslie C. Gillen to practice specially in this case and enter Edw. W. Scruggs as associate counsel for plaintiff. Enter proceedings of trial. Jury empaneled and sworn. At 3:20 recess to 9:30 a.m., tomorrow.
Feb. 28—Order allow counsel for plaintiff to withdraw temporarily the deposition of Henrietta Roher for purpose of having X-rays examined by local physician at his office.
Mar. 1—File depositions of Verne T. Inman and Paul A. Grigorieff.

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- Mar. 1—Docket Jury List, filed February 28, 1950.
- Mar. 1—File Plaintiff's Praecipe for subpoena duces tecum to Custodian St. Mary's Hospital.
- Mar. 1—Issue subpoena duces tecum to Custodian St. Mary's Hospital.
- Mar. 1—Enter further proceedings of trial. Counsel for plaintiff objects to trial of issue of liability first. Order objection overruled. Counsel for defendant moves for directed verdict on question of negligence. Order containing motion for further hearing to March 2, 1950, after close plaintiff's case. On stipulation counsel order allow counsel for plaintiff to withdraw depositions of Inman and Grigorieff overnight.
- Mar. 2—File deposition of Dr. J. Donald Francis, taken on plaintiff's behalf in San Francisco, California, on 3/1/50.
- Mar. 2—Enter further proceedings of trial. On stipulation of counsel, Order allow plaintiff to call custodian of records of St. Mary's Hospital at this time to identify records now produced pursuant to subpoena. At 4:10 p.m., Order recess to 9:30 a.m., tomorrow.
- Mar. 3—Enter further proceedings of trial. At 3:20 p.m., Order excuse jury from further consideration until 9:30 a.m., on 3/4/50. Thereupon counsel for defendant renews motion for directed verdict. Court fixes

time for arguing defendant's motion and
1950

for arguing question of admissibility of statements and photographs on Saturday morning, at 9 a.m., to which time counsel are excused.

Mar. 4—Enter further proceedings of trial: At 9:00 a.m., parties and all counsel being present, argument is had on defendant's motion for directed verdict and for admissibility of exhibits. Motion for directed verdict, submitted, ruling reserved. Order exhibits admitted. Counsel stipulate to dismissal of first cause of action. Order dismiss as to first cause of action. At 10:30 o'clock, jury return to courtroom. Counsel for defendant reads statements and shows exhibits to jury. Counsel stipulate as to acceptance of any recognized standard mortality rates as to plaintiff's life expectancy. At 11:50 a.m., Order excuse jury to 3/6/50, at 10 a.m. Admissibility of deposition of Dr. Francis argued, ruling reserved. At 12:05, Order counsel excused to 3/6/50, at 9:30 a.m.

Mar. 4—File defendant's objection to deposition of Dr. J. Donald Francis, and Affidavit in Support thereof.

Mar. 6—File Plaintiff's Proposed Instructions.

Mar. 6—File Plaintiff's Additional Proposed Instructions.

Mar. 6—File Defendant's Proposed Instructions.

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- Mar. 6—On for further trial. At 10:00 a.m., all parties and all counsel and jurors are present pursuant to recess. Order appoint Chas. W. Otis as foreman and Order jury return verdict for defendant. Verdict signed; read by clerk and entered as verdict herein. Order judgment upon the verdict for the defendant against the plaintiff be entered herein. Order excuse jury from this case.
- Mar. 6—Enter and file verdict for defendant.
- Mar. 7—Enter and file judgment for the defendant on the verdict.
- Mar. 7—Mail notice to counsel of entry of judgment.
- Mar. 22—File subpoena Bonnie Tendler returned served 3/3/50.
- Apr. 5—File Plaintiff's Notice of Appeal.
- Apr. 5—Forward copy of Notice of Appeal to Messrs. Knapp, Boyle, Bilby & Thompson.
- Apr. 5—File Plaintiff's Cost Bond on Appeal.
- Apr. 5—File Plaintiff's Designation of Record on Appeal.
- May 1—File Volumes I & II of Reporter's Transcript of Testimony.
- May 10—Forward Record on Appeal to Clerk, Court of Appeals, Ninth Circuit, San Francisco, Calif.
- May 10—Forward copies letter of transmittal of record to Clerk, CCA, to counsel with copies of Clerk's Certificate.

In the District Court of the United States, Northern
District of California, Southern Division

No. 27834-R

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

COMPLAINT FOR DAMAGES—PERSONAL
INJURIES FIRST CAUSE OF ACTION

Plaintiff complains of defendant and for First
Cause of Action alleges:

I.

That at all times herein mentioned defendant was,
and now is, a corporation organized and existing
under and by virtue of the laws of the State of
Kentucky, and does business in the State of Cali-
fornia, and in other states and has its principal
place of business in the City and County of San
Francisco, State of California, in the Northern
District of California; that said defendant was at
all times herein mentioned, and now is, engaged in
the business of a common carrier by railroad in
interstate commerce in said City and County and
State, as well as in other parts of the State of
California, and in other states.

II.

That at all times herein mentioned defendant was a common carrier by railroad engaged in interstate commerce and plaintiff was employed by defendant in such interstate commerce, and the injuries to plaintiff hereafter set forth arose in the course of and while plaintiff and defendant were engaged in the conduct of such interstate commerce.

III.

That this cause of action is brought under and by virtue of the provisions of the Safety Appliances and Equipment Act, 45 U.S.C.A., Section 1, et seq.

IV.

That on or about August 29, 1946, at or about 2:00 o'clock in the afternoon, plaintiff was employed as a signal maintainer riding on defendant's track approximately two (2) miles east of Wilcox, Arizona.

V.

That at said time and place, in the regular course and scope of his employment in such interstate commerce by defendant as aforesaid, plaintiff, having been sent by defendant to service a signal used in interstate commerce by defendant at a point approximately three (3) miles east of Wilcox, Arizona, was traveling on defendant's track and roadbed in a motor car of defendant; that in the course of said operation said motor car left said track and threw plaintiff up in the air and over to the side of said track, knocking plaintiff un-

conscious; that said motor car, and said track and roadbed were defective, insecure and insufficient and defendant used the same in interstate commerce in violation of the provisions of the Safety Appliances and Equipment Act, 45 U.S.C.A., Section 1 et seq; that as a proximate result of said motor car leaving said track and throwing plaintiff as aforesaid plaintiff suffered the following injuries:

1. A deep laceration of the skull with bony injury;
2. A fracture of the left index metacarpal bone;
3. A severe sprain of the distal joint of the right index finger;
4. A sprain of the low back;
5. A comminuted fracture of the left patella with marked chondromalacia of the remaining fragments of the patella;
6. A compound fracture of the right tibia and a fracture of the astragalus with upward displacement of the neck of the astragalus.

That as a direct result of the above injuries so sustained as aforesaid plaintiff suffered excruciating pain, severe physical and mental shock and was necessarily hospitalized for a long period of time, and still is suffering and is hospitalized as aforesaid.

That plaintiff is informed and believes and therefore alleges that said injuries are permanent, and may necessitate amputation of the right leg at the knee.

VI.

That at the time of the happening of the aforesaid accident, plaintiff was a strong and able-bodied man, capable of earning, and in fact earning, the sum of Two Hundred Ninety (\$290.00) Dollars per month; that as a direct and proximate result of defendant's use of said track and roadbed and motor car aforementioned, and its carelessness and negligence as aforesaid, and the injuries proximately caused thereby, plaintiff has been unable to follow his usual occupation, or, any occupation, and is informed and alleges that in the future he will be disabled for an indefinite period of time from following his usual occupation, or, any occupation, all to his damage in an amount as yet unascertainable, and when said sum is ascertained plaintiff will pray leave of court to insert said sum as a reasonable value of said loss of wages.

VII.

That in the necessary treatment of said injuries plaintiff has incurred expenses for the services of physicians and surgeons, and for hospitalization and for X-rays, and prays leave of this court to amend this complaint by incorporating herein the reasonable value of said services and articles when the same are ascertained.

VIII.

That by reason of the premises plaintiff has been damaged in the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars.

Second Cause of Action

As and for a Second Cause of Action against defendant plaintiff complains of defendant and for cause of action alleges:

I.

Incorporates herein by reference Paragraphs I and II of plaintiff's First Cause of Action.

II.

That this cause of action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq.

III.

That on or about August 29, 1946, at or about 2:00 o'clock in the afternoon, plaintiff was employed as a signal maintainer riding on defendant's track approximately two (2) miles east of Wilcox, Arizona.

IV.

That at said time and place, in the regular course and scope of his employment in such interstate commerce by defendant as aforesaid, plaintiff, having been sent by defendant to service a signal used in interstate commerce by defendant at a point approximately three (3) miles east of Wilcox, Arizona, was traveling on defendant's track and roadbed in

a motor car of defendant; that in the course of said operation said motor car left said track and threw plaintiff up in the air and over to the side of said track, knocking plaintiff unconscious; that defendant carelessly and negligently failed to inspect said motor car and said track and roadbed and learn of their defective, insecure and insufficient condition, and carelessly and negligently failed to provide a safe motor car and safe track and roadbed for plaintiff; that as a proximate result of defendant's carelessness and negligence as aforesaid plaintiff suffered the following injuries:

1. A deep laceration of the skull with bony injury;

2. A fracture of the left index metacarpal bone;

3. A severe sprain of the distal joint of the right index finger;

4. A sprain of the low back;

5. A comminuted fracture of the left patella with marked chondromalacia of the remaining fragments of the patella;

6. A compound fracture of the right os calcis and a fracture of the astragalus with upward displacement of the neck of the astragalus.

That as a direct result of the above injuries so sustained as aforesaid plaintiff suffered excruciating pain, severe physical and mental shock and was

necessarily hospitalized for a long period of time, and still is suffering and is hospitalized as aforesaid.

That plaintiff is informed and believes and therefore alleges that said injuries are permanent, and may necessitate amputation of the right leg at the knee.

V.

Incorporates herein by this reference Paragraphs VI, VII and VIII of plaintiff's First Cause of Action against defendant.

Wherefore, plaintiff prays judgment against defendant in the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars, together with such special damages as hereafter may be ascertained, and for his costs of suit herein.

LESLIE C. GILLEN,
Attorney for Plaintiff.

Duly verified.

Summons and return attached.

[Endorsed]: Filed Jan. 8, 1948.

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME

It is hereby stipulated by and between the respective parties hereto that the defendant Southern Pacific Company, a corporation, may have to and including the 13th day of February, 1948, within which to plead to plaintiff's complaint on file herein.

Dated this 29th day of January, 1948.

/s/ LESLIE C. GILLEN,
Attorney for Plaintiff.

So ordered Jan. 3, 1948.

/s/ LOUIS E. GOODMAN,
Judge.

Dated: January 30, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now defendant Southern Pacific Company, a corporation, and answers the complaint of plaintiff on file herein as follows:

Answering the First Cause of Action in said complaint contained, defendant admits, denies, alleges and avers as follows, to wit:

I.

Answering paragraph I, defendant admits that

at all times mentioned in the complaint it was a corporation organized and existing under and by virtue of the laws of the State of Kentucky and doing business in the State of California, and other States, and had its principal place of business in the City and County of San Francisco; that defendant was at all times mentioned in the complaint engaged in the business of a common carrier by railroad in interstate commerce in said City, County and State, as well as other States, and said defendant denies, generally and specifically that it now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky.

II.

Answering Paragraph II, defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

Further answering said Paragraph II, defendant admits that at the times and places set forth in plaintiff's complaint, plaintiff was employed by the aforementioned Southern Pacific Company, a Kentucky corporation, in interstate commerce.

III.

Answering Paragraphs V and VI, defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

IV.

Answering Paragraph VII, defendant alleges that it does not have sufficient information or belief on the subject to enable it to answer the, or any of the, allegations therein contained, and basing its denial on that ground, denies each and every, all and singular, generally and specifically, the allegations contained in said Paragraph VII, and each and every part thereof.

V.

Answering Paragraph VIII, defendant denies that by reason of any carelessness or negligence on its part plaintiff has been damaged in the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars, or in any other sum or sums whatsoever, or at all.

Wherefore, defendant prays judgment as hereinafter set forth.

Answering the further second, separate and distinct cause of action in said complaint set forth, defendant admits, denies, alleges and avers as follows, to wit:

I.

Answering Paragraph I, defendant refers to its answer to Paragraphs I and II of the First Cause of Action, and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

II.

Answering Paragraph IV, defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

III.

Answering Paragraph V, defendant refers to its answer to Paragraphs VI, VII and VIII of the First Cause of Action, and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

Further answering said complaint, and as a separate defense to said action, defendant avers that plaintiff was himself careless and negligent in and about the matters and things in said complaint set forth, and that said carelessness and negligence of plaintiff proximately contributed to the happening of the accident in the complaint referred to, and the injuries, if any, complained of by plaintiff.

Further Answering Said Complaint, and as a Separate Defense To Said Action, defendant avers that plaintiff was himself guilty of carelessness and negligence in and about the matters and things in said complaint referred to and that said carelessness and negligence of plaintiff was the sole proximate cause of his injuries, if any.

Wherefore, defendant prays that plaintiff take

nothing by his action, and that it have judgment for its costs of suit.

JOHNSON, RICKSEN &
JOHNSON,

/s/ MARSHALL RICKSEN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 17, 1948.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

To defendant above-named and to Messrs. Johnson & Rickson & Johnson, its attorneys:

You and each of you will please take notice that plaintiff hereby demands a trial by jury in the above-entitled action.

Dated: This 14th day of February, 1948.

/s/ LESLIE C. GILLEN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 17, 1948.

[Title of District Court and Cause.]

CLERK'S NOTICE OF TIME AND PLACE OF TRIAL

To Leslie C. Gillen, Esq., 886 Mills Bldg., San Fran-

cisco 4, Calif., and Messrs. Johnson, Rickson & Johnson, 1003 Central Bank Bldg., Oakland 12, Calif.

You are hereby notified that on March 29, 1948, the above-entitled case will appear on the Law and Motion calendar of Judge Michael J. Roche, to be set for trial.

Dated Feb. 16, 1948.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

CLERK'S NOTICE OF PRE-TRIAL
CONFERENCE

To Leslie C. Gillen, Esq., 886 Mills Bldg., San Francisco 4, Calif., and Messrs. Johnson, Rickson & Johnson, 1003 Central Bank Bldg., Oakland 12, Calif.

You are hereby notified that on March 29, 1948, Judge Michael J. Roche ordered that the above-entitled case be and the same hereby is continued to April 12 for a pre-trial conference.

Dated March 30, 1948.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

NOTICE OF TIME AND PLACE OF TRIAL
To Defendant above-named and to Messrs. Johnson, Rickson & Johnson, its attorneys:

You and each of you will please take notice and you are hereby notified that the above-entitled action is set for trial before Honorable Michael J. Roche, District Judge, at his Courtroom, United States Post Office and Court House Building, Seventh and Mission Streets, San Francisco, California, on the 5th day of October, 1948 at 10:00 o'clock in the forenoon of said day.

Dated: This 7th day of May, 1948.

/s/ LESLIE C. GILLEN,
Attorney for Plaintiff.

Receipt of copy admitted.

[Endorsed]: Filed June 11, 1948.

[Title of District Court and Cause.]

NOTICE OF TAKING DEPOSITION PURSU-
ANT TO RULES 26 AND 30 OF FEDERAL
RULES OF CIVIL PROCEDURE

To Plaintiff, Adolph J. Schnee, and to Leslie C. Gillen, his attorney:

You, and each of you, will please take notice that defendant Southern Pacific Company, having answered herein, will take in the above-entitled action, for discovery and to be used therein as evidence, and as authorized by the Federal Rules of Civil Procedure, the deposition of plaintiff Adolph J. Schnee.

Said deposition will be taken at 2:30 o'clock p.m., on Monday, October 18, 1948, and will continue thereafter until completed, and if not completed on said day will be continued from day to day (Sundays and holidays excepted) until completed.

Said deposition will be taken before Harold Hart whose address is 564 Market Street, San Francisco, California, and who is a Notary Public in and for the City and County of San Francisco, and an officer authorized to administer oaths by the laws of the State of California, the place where the examination is to be held, and who is not a relative or an employee or an attorney of any of the parties to the above-entitled action, or their attorneys, or financially interested in the above-entitled action.

Said deposition will be taken at the offices of Hart and Hart, 564 Market Street, Room 715, Chancery Building, San Francisco, California, at which time and place you are hereby notified to appear.

Said deposition will be taken on oral interrogatories.

Dated this 8th day of October, 1948.

JOHNSON, RICKSEN,
FREEMAN & JOHNSON,

By /s/ JAMES H. FREEMAN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 9, 1948.

[Title of District Court and Cause.]

MOTION FOR TRANSFER

To the plaintiff above named, Adolph J. Schnee,
and to Leslie C. Gillen, his attorney:

You, and each of you, will please take notice that defendant Southern Pacific Company, a corporation, on Monday, November 22, 1948, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, will move the above-entitled Court for an Order transferring the above-entitled action to the Federal District Court of Arizona, under the provisions of U.S.C.A., Title 28, Section 1404 A, B and C for the convenience of parties and witnesses, and in the interest of justice. Said motion will be based upon the following grounds:

1. Plaintiff in this action resides in said District, to wit, at 2470 Oracle Road, Tucson, Arizona.

2. The accident giving rise to this action took place in said District, to wit, at the Southern Pacific tracks in the vicinity of Willcox, Arizona.

3. Defendant will require the appearance of approximately ten (10) witnesses, all of whom reside in the State of Arizona.

4. Plaintiff received his preliminary medical attention within the boundaries of said District, to wit, Tucson, Arizona, and the doctors performing said treatment reside in Tucson, Arizona.

5. Said District of Arizona is a District where said action might have been brought.

Attached hereto is an Affidavit in support of said Motion.

Dated this 17th day of November, 1948.

JOHNSON, RICKSEN,
FREEMAN & JOHNSON,

By /s/ JAMES H. FREEMAN,
Attorneys for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES H. FREEMAN

State of California,
County of Alameda—ss.

James H. Freeman, being first duly sworn, deposes and says: That he is now and at all times herein mentioned, was over the age of 21 years and is not a party to the above-entitled action; that he is one of the attorneys in charge of the defense of this action; that he is familiar with the pleadings and evidentiary matter to be used in the said defense and that from a study of such evidentiary matter now at his disposal, states that plaintiff in this action resides in Arizona, to wit, at 2470 Oracle Road, Tucson, Arizona; that the accident giving rise to this action took place at the Southern Pacific tracks in the vicinity of Willcox, Arizona; that it

appears from the evidentiary matter that defendant will require the appearance of approximately ten (10) witnesses, all of whom reside in Arizona; that plaintiff received his preliminary medical attention in Tucson, Arizona, and the doctors performing such preliminary treatment reside in Arizona; that the issue of liability in this matter is disputed and to adequately defend this action, it appears that the attendance of approximately ten (10) witnesses plus one (1) or more medical witnesses must be brought from Arizona to attend this trial in San Francisco in the event the matter is not transferred to Arizona; that this transportation of witnesses would place defendant and said witnesses at a considerable expense and inconvenience.

/s/ JAMES H. FREEMAN.

Subscribed and sworn to before me this 17th day of November, 1948.

[Seal] DELIA L. EDGE,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Nov. 17, 1948.

In the District Court of the United States, Northern
District of California, Southern Division.

No. 27834-R

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

ORDER FOR TRANSFER

Due notice of motion having been given, and the parties having appeared before said Court, and evidence, authorities and argument presented to said Court, and it appearing to said Court that said Motion being one properly brought under the Provisions of U.S.C.A., Title 28, Section 1404 A, B and C, and that:

1. The plaintiff in this action resides in Arizona, to wit, at 2470 Oracle Road, Tucson, Arizona;

2. The accident giving rise to this action took place in Arizona, to wit, at the Southern Pacific tracks in the vicinity of Willcox, Arizona.

3. It appears that defendant will require the appearance of approximately ten (10) witnesses, all of whom reside in the State of Arizona.

4. The doctors who treated plaintiff during some stages of his injury reside in Arizona.

It further appearing that the Federal District Court of Arizona is a district where said action might have been brought, that said Transfer is for the convenience of parties and witnesses, in the interest of justice, and good cause appearing therefor,

It is therefore ordered that this case be transferred to the United States District Court for the District of Arizona, and that the Clerk of this Court shall forthwith forward all of the files in said proceeding to the Clerk of said District at Arizona, together with a copy of this Order.

Dated this 3rd day of December, 1948.

MICHAEL J. ROCHE,
Judge, U. S. District Court.

A true copy.

[Endorsed]: Filed Dec. 3, 1948.

United States District Court
Office of the Clerk

Northern District of California
San Francisco 1

(Record Transferred from Northern District of
California) No. 27834-R—Cir. 486—Tue.

[Title of Cause.]

CLERK'S CERTIFICATE OF TRANSFER

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, to wit:

1. Complaint.
2. Summons.
3. Stipulation Extending Time.
4. Answer.
5. Demand for Jury Trial.
6. Affidavit of Service by Mail of Demand for Jury Trial.
7. Notice of Time and Place of Trial.
8. Notice of Taking Deposition Pursuant to Rules 26 and 30 of Federal Rules of Civil Procedure.
9. Motion for Transfer.

are the original documents filed in the above case, together with a certified copy of the Order granting the motion for change of venue.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said District Court, at

San Francisco, California, this 7th day of December, 1948.

[Seal] /s/ C. W. CALBREATH,
Clerk.

[The foregoing record transferred from the Northern District of California: Endorsed and Filed Jan. 3, 1949, U.S.D.C., for the District of Arizona.]

In the District Court of the United States
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF FEBRUARY 28, 1950

This case comes on regularly for trial this day. The plaintiff is present with his counsel, Leslie C. Gillen, Esq., and Edward W. Scruggs, Esq., B. G. Thompson, Esq., and Arthur Henderson, Esq., are present for the defendant. Fred Baker is present as the official court reporter.

It Is Ordered that Leslie C. Gillen be admitted to practice in this Court specially in this case and that Edward W. Scruggs be entered as associate counsel for the plaintiff.

Both sides announce ready for trial.

Examination of jurors on voir dire is now had. Thereupon, at the hour of twelve o'clock, noon,

It Is Ordered that the further trial of this case be continued to the hour of two o'clock p.m., this date, to which time the Jurors, being first duly admonished by the Court, all parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m., the Jurors, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Examination of jurors on voir dire is resumed and concluded.

At the hour of 2:50 o'clock p.m., all jurors are excluded from the courtroom.

Counsel for the plaintiff now states that the plaintiff is in a position where three veniremen who have an attorney-client relationship with the defendant's counsel are on the panel and that the plaintiff's three preemptory challenges would be exercised and exhausted thereon, and moves for a re-examination of said jurors.

Counsel for the defendant stipulates that one of said veniremen Fernando B. Pacheco, may be excused for cause, and It Is So Ordered.

Thereupon, at the hour of 3:00 o'clock p.m., the jurors return into Court, and further examination of jurors on voir dire is now had.

A lawful jury of twelve persons now duly empaneled and sworn to try this case, and

It Is Ordered that all jurors not empaneled in the trial of this case be excused until March 6, 1950, at ten o'clock a.m.

And thereupon, at the hour of 3:20 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of 9:30 o'clock a.m., March 1, 1950, to which time the jury, being first duly admonished by the Court, all parties and counsel are excused.

In the District Court of the United States
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF MARCH 1, 1950

The jury, and all members thereof, all parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Statement of the case is now made by the counsel for the respective parties to the jury.

Counsel for the plaintiff moves to invoke the Rule. Said motion is granted and all witnesses present are now duly sworn, instructed by the Court and excluded from the courtroom.

Counsel for both sides now stipulate with respect to plaintiff's employment with the defendant corporation at the time of the accident.

Plaintiff's Case:

The plaintiff, Adolph J. Schnee, is now sworn and examined in his own behalf.

Thereupon, at the hour of twelve o'clock, noon, It Is Ordered that the further trial of this case be continued to the hour of 1:30 o'clock p.m.

Subsequently, at the hour of 1:30 o'clock p.m., the jury, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

The Court now indicates that the issue of liability will be tried first.

Plaintiff's Case Continued:

The plaintiff, Adolph J. Schnee, is now recalled and further examined in his own behalf.

Counsel for the defendant elects to cross-examine the plaintiff as an adverse party as a part of the defendant's case.

Dick Hallmark is now sworn and examined on behalf of the plaintiff.

Thereupon, at the hour of 2:40 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of 3:00 o'clock p.m.

Subsequently, at the hour of 3:00 o'clock, p.m., the jury, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Counsel for the plaintiff now states that he has an objection to make at this time, and

It Is Ordered that the record show that said objection may be made at adjournment.

Dick Hallmark is now recalled and further examined on behalf of the plaintiff.

Richard R. Singleton is now sworn and examined on behalf of the plaintiff.

Counsel for the plaintiff now states that the plaintiff has an additional witness on the question of liability who is not available at this time.

It Is Orderēd that the defendant's case on the question of liability proceed at this time and that the defendant's motion to be made at the close of the plaintiff's case may be presented at recess time as of the close of plaintiff's case. Counsel for the plaintiff objects to the defendant's case opening before the plaintiff's case is closed.

Defendant's Case:

The following defendant's witnesses, heretofore sworn, are now called and examined: Alexander J. Young, Mark O. Wallace.

Thereupon, at the hour of 4:00 o'clock p.m., the jury is excused to March 2, 1950, at the hour of ten o'clock, a.m.

Counsel for the plaintiff now objects to the Court proceeding in the manner indicated by the Court and states his grounds therefor, and

It Is Ordered that said objection be and it is overruled and that the plaintiff be allowed to call his other witness at ten o'clock a.m., tomorrow.

Counsel for the defendant now moves for a directed verdict on the question of defendant's negligence, for want of proof, and argues said motion to the Court.

It is ordered that said motion be continued for

further hearing until after the close of plaintiff's case.

Thereupon, at the hour of 4:10 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of ten o'clock a.m., March 2, 1950, to which time all parties and counsel are excused.

On stipulation of counsel, It Is Ordered that the plaintiff be allowed to withdraw the depositions of Verne T. Inman and Paul A. Gregorieff overnight.

In the District Court of the United States
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF MARCH 2, 1950

The jury, and all members thereof, all parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Counsel for the plaintiff now states that the plaintiff has no other witnesses to call at this time.

Defendant's Case Continued:

Robert W. Ward, heretofore sworn, is now called and examined on behalf of the defendant.

On stipulation of counsel,

It Is Ordered that the plaintiff be allowed to call the Custodian of Records of St. Mary's Hospital at this time to identify records now produced pursuant to subpoena.

Patricia May James is now sworn and examined on behalf of the plaintiff.

Plaintiff's exhibit 4, St. Mary's Hospital records pertaining to A. J. Schnee, is now admitted in evidence.

It Is Ordered that said exhibit 4 be returned to St. Mary's Hospital after this trial.

Robert W. Ward, heretofore sworn, is now recalled and further examined on behalf of the defendant.

N. A. Wisner, heretofore sworn, is now called and examined on behalf of the defendant.

Robert W. Ward, heretofore sworn, is now recalled and further examined on behalf of the defendant.

Plaintiff's exhibit 5, Statement of Robert W. Ward, is now admitted in evidence.

Plaintiff's exhibit 6, Diagram, is now admitted in evidence.

David E. Wisner, heretofore sworn, is now called and examined on behalf of the defendant.

Thereupon, at the hour of 12:00 o'clock, noon, It Is Ordered that the further trial of this case be continued to the hour of 1:30 o'clock p.m.

Subsequently, at the hour of 1:30 o'clock, p.m., the jury, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case Continued:

Robert W. Ward, heretofore sworn, is now recalled and further examined on behalf of the defendant.

Defendant's exhibit A, Statement of Robert W. Ward, is now admitted in evidence.

James M. Carroll, heretofore sworn, is now called and examined on behalf of the defendant.

R. S. Glasser is now sworn and examined on behalf of the defendant.

Adolph J. Schnee, heretofore sworn, is now called and cross-examined by the defendant under the statute.

John D. Caldwell is now sworn and examined on behalf of the defendant.

Thereupon, at the hour of 4:10 p.m., It Is Ordered that the further trial of this case be continued to the hour of 9:30 o'clock a.m., March 3, 1950, to which time the jury, all parties and counsel are excused.

In the District Court of the United States
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF MARCH 3, 1950

The jury, and all members thereof, all parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Defendant's Case Continued:

The following defendant's witnesses heretofore sworn are now recalled and further examined: John D. Caldwell, Mark O. Wallace.

Defendant's exhibit F, Employee's Report of Accident, except as to the portion that testimony shows was added after employee's statement was made, is now admitted in evidence, and

It Is Ordered that the Clerk obliterate the portion which testimony shows was added.

Mary Jo Russell Stephens is now sworn and examined on behalf of the defendant.

Thereupon, at the hour of 10:35 o'clock, a.m., It Is Ordered that the further trial of this case be continued to the hour of 10:45 o'clock a.m.

Subsequently, at the hour of 10:45 o'clock a.m., the jury, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case Continued:

Mary Jo Russell Stephens heretofore sworn is now further examined on behalf of the defendant.

Mary Stewart is now sworn and examined on behalf of the defendant.

It Is Ordered that defendant's exhibit H, as to the upper portion of the First Injury Report, be admitted provisionally.

Leland E. Lyon, heretofore sworn, is now called and examined on behalf of the defendant.

It Is Ordered that defendant's exhibits C-4 and C-5, Photographs, be admitted in evidence.

Thereupon, at the hour of 12:00 o'clock, noon, It Is Ordered that the further trial of this case be continued to the hour of 1:30 o'clock p.m.

Subsequently, at the hour of 1:30 o'clock p.m., the jury, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case Continued:

Alfred Clarence Jacobson, heretofore sworn, is now called and examined on behalf of the defendant.

The following defendant's exhibits are now admitted in evidence: C-1, Photograph, C-2, Photograph, C-3, Photograph, J, Photograph, K, Photograph, L, Photograph, B, Photographs (7), D-1, Photograph, D-2, Photograph, D-3, Photograph, D-4, Photograph, D-5, Photograph, and G, Statement of Adolph J. Schnee.

And the defendant rests.

Rebuttal:

Alma Tendler, known as Bonnie, is now sworn and examined on behalf of the plaintiff.

Mrs. Adolph Schnee, heretofore sworn, is now called and examined on behalf of the plaintiff.

Adolph Schnee, heretofore sworn, is now recalled and further examined in his own behalf.

Defendant's exhibit M, only that portion of the Application of Employment containing the applicant's signature, is now admitted in evidence.

Counsel for the plaintiff now requests leave to call one more witness tomorrow.

Surrebuttal:

The defendant rests on the question of liability except for reading to the jury the exhibits admitted dependent on the Court's ruling on the admissibility of statements.

Thereupon, at the hour of 3:20 o'clock p.m., It Is Ordered that the jury be excused until Saturday, March 4, 1950, at 9:30 o'clock a.m.

Counsel for the defendant now renews his motion for a directed verdict in two parts on the grounds that no evidence has been presented to show liability and secondly, that no evidence proving negligence has been presented.

Whereupon, the Court fixes the time for arguing defendant's motion for a directed verdict and for arguing the question of admissibility of statements on Saturday, March 4, 1950, at nine o'clock a.m., to which time all parties and counsel are excused.

In the District Court of the United States,
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF MARCH 4, 1950

At the hour of nine o'clock a.m., Leslie C. Gillen, Esquire, and Edward W. Scruggs, Esq., are present for the plaintiff. B. G. Thompson, Esquire, and Arthur Henderson, Esquire, are present on behalf

of the defendant. The admissibility of exhibits is now argued by respective counsel, and

It Is Ordered that the exhibits be admitted.

Defendant's motion for a directed verdict is now duly argued by respective counsel.

Counsel for the plaintiff states that the plaintiff is willing to stipulate to dismissal of the first cause of action. Whereupon,

It Is Ordered that this case be and it is dismissed as to the first cause of action.

Defendant's motion for directed verdict is further argued by counsel, submitted and taken under advisement.

The exhibits heretofore admitted provisionally, to wit: photograph and statements, are now admitted in evidence.

Thereupon, at the hour of 9:30 o'clock a.m., the jury, and all members thereof, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Counsel for the defendant now reads defendant's exhibit F, exhibit G and exhibit H to the jury and the photographs admitted in evidence are presented to the jury.

Adolph J. Schnee, heretofore sworn, is now recalled and further examined in his own behalf.

Respective counsel now stipulate to acceptance of any recognized standard mortality rate as to plaintiff's life expectancy.

Thereupon, at the hour of 11:45 o'clock a.m., It Is Ordered that the jury be excused until Monday, March 6, 1950, at ten o'clock a.m.

Admissibility of the deposition of Dr. Francis is now argued. The Court reserves ruling.

At the hour of 12:05 o'clock noon, It Is Ordered that the further trial of this case be continued to the hour of 9:30 o'clock a.m., on Monday, March 6, 1950, to which time all parties and counsel are excused.

In the District Court of the United States,
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF MARCH 6, 1950

The jury, and all members thereof, all parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

It Is Ordered that Charles W. Otis be and he is appointed as Foreman of the jury, and It Is Ordered that the jury return a verdict in favor of the defendant. Whereupon, the Foreman signs and presents the following verdict:

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empaneled and sworn to try the above-entitled cause, do, by direction of the Court, find for the Defendant.

Dated this 6th day of March, 1950.

CHAS. W. OTIS,
Foreman.

The verdict is read as recorded, and

It Is Ordered that Judgment upon the verdict for the defendant and against the plaintiff be entered herein.

It Is Further Ordered that the jury be discharged from the further consideration of this case.

In the District Court of the United States
for the District of Arizona

No. Civil 486-Tucson

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

VERDICT

We, the jury, duly empaneled and sworn to try
the above-entitled cause, do, by direction of the
Court, find for the Defendant.

Dated this 6th day of March, 1950.

/s/ CHAS. W. OTIS,
Foreman.

[Endorsed]: Filed Mar. 6, 1950.

In the United States District Court
for the District of Arizona

No. Civ. 486-Tucson

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

JUDGMENT

This Cause coming on regularly for trial before the Court sitting with a jury, and the evidence on the part of the plaintiff and defendant on the issue of defendant's liability herein having been presented, and the Court having thereupon, on motion of the defendant, directed a verdict for defendant, and the jury having returned its verdict accordingly:

Wherefore, It Is Ordered and Adjudged, that plaintiff take nothing by his action and no costs.

Done in open Court this 7th day of March, 1950.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed and docketed Mar. 7, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS RULE 73(b)

Notice Is Hereby Given that Adolph J. Schnee, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 7, 1950.

Dated, San Francisco, April 3rd, 1950.

/s/ LESLIE C. GILLEN,
San Francisco, Attorney for
Appellant,
Adolph J. Schnee.

SCRUGGS & BUTTERFIELD,
By /s/ EDWARD W. SCRUGGS,
Tucson, Attorneys for
Appellant,
Adolph J. Schnee.

Copy received 4/15/50.

[Endorsed]: Filed April 5, 1950.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Adolph J. Schnee, as Principal and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut, and authorized to transact surety business in the State of Arizona, as Surety, do hereby acknowledge ourselves, jointly and severally bound to Southern Pacific Company, a corporation, defendant, in the above-entitled case, for the Sum of Two Hundred Fifty and No/100 Dollars (\$250.00) for the payment of all costs of appeal if the appeal taken in the above-entitled case is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified.

Sealed with our seals, and dated this 5th day of April, A.D. 1950.

Conditioned, however, that the said plaintiff in the above-entitled case will pay all costs on appeal from the judgment entered in said case on the 7th day of March, 1950, if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, and judgment for said costs may be entered against us, and each of us, in the final judgment of this cause.

In Testimony Whereof, the said Principal has subscribed his name and affixed his seal, and the

said Surety has caused its name and seal to be hereunto affixed by its duly authorized agent at Tucson, Arizona, on the day and year first hereinabove written.

/s/ ADOLPH J. SCHNEE,

By /s/ EDWARD W. SCRUGGS,
As His Attorney,

HARTFORD ACCIDENT AND
INDEMNITY COMPANY,
Surety,

By /s/ [Indistinguishable.]

[Endorsed]: Filed April 5, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL
RULE 75

Plaintiff and appellant Adolph J. Schnee hereby designates for inclusion the complete record and all the proceedings and evidence in the action.

Dated, San Francisco, April 3rd, 1950.

/s/ LESLIE C. GILLEN,
Attorney for Said Plaintiff
and Appellant.

SCRUGGS & BUTTERFIELD,
By /s/ EDWARD W. SCRUGGS,
Attorneys for Appellant,
Adolph J. Schnee.

Copies received.

[Endorsed]: Filed April 5, 1950.

In the District Court of the United States
for the District of Arizona

No. Civ. 486-Tucson

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

TRANSCRIPT OF TESTIMONY AND
PROCEEDINGS

Taken before the Honorable Claude McColloch,
Judge, and Jury, on Tuesday, February 28, 1950,
at 10:00 o'clock a.m., at Tucson, Arizona.

Appearances:

LESLIE C. GILLEN and

EDWARD W. SCRUGGS,

For the Plaintiff.

KNAPP, BOYLE, BILBY & THOMPSON,

By B. G. THOMPSON and

ARTHUR HENDERSON,

For the Defendant.

The Court: Are we ready to proceed with Civil Number 486?

Mr. Scruggs: We are ready, your Honor.

Mr. Thompson: Ready.

The Court: Call the Jury.

The Clerk: There are forty-seven names in the box; we draw the names of eighteen.

The Court: All right.

(Jury panel called and sworn.)

(Jury panel examined by Court and counsel and Jury impaneled and sworn.)

The Court: The other jurors are now excused until next Monday morning at 10:00 o'clock in this Courtroom.

Gentlemen of the Jury, that is all we can do to-day. Don't discuss this case or permit it to be discussed with you until it is submitted to you; in the meantime you are excused until 9:30 in the morning.

(Whereupon a recess was taken at 3:00 o'clock p.m. until 9:30 o'clock a.m., Wednesday, March 1st.)

The Court: Mr. Gillen, you may make your opening statement.

Thereupon, after counsel for the respective parties made their opening statements to the Jury the following proceedings were had:

The Court: Call the witnesses.

Mr. Gillen: Your Honor, the plaintiff will ask at this time that all witnesses be excluded from the

Courtroom. That, of course, does not include the plaintiff.

The Court: Is that the usual practice on the request of either side? [2*]

Mr. Thompson: It is, your Honor.

The Court: Very well.

Mr. Thompson: The usual practice is to call the witnesses and have them sworn so that the Court can admonish them not to violate the order.

The Court: Whatever way you usually do it.

Mr. Thompson: The practice is for the plaintiff to call his witnesses first.

(Witnesses called and sworn.)

The Court: Mrs. Schnee, and gentlemen, you understand you are not to come in the Courtroom, except when the Bailiff comes out and calls you in to testify. Be sure to observe that.

Mr. Gillen: I anticipate other witnesses; at any other session we may take the precaution of checking, your Honor. May I ask at this time whether or not counsel for the defendant will be willing to stipulate as a proven fact that on August 29, 1946, at the time this accident occurred that Mr. Schnee, the plaintiff in the action, was an employee of the Southern Pacific Company engaged in interstate commerce and acting within the scope of his employment as a signal maintenance man.

Mr. Henderson: Yes, we will so stipulate.

Mr. Gillen: That will be a conceded fact, Your Honor. [3]

* Page numbering appearing at top of page of original Reporter's Transcript.

The plaintiff will take the witness stand in his own behalf.

ADOLPH J. SCHNEE

the plaintiff herein, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Q. Mr. Schnee, I want you to speak clear so that everyone in here can hear you, the Court, Jury, and Reporter and counsel. Will you state your full name, please?

A. Adolph John Schnee.

Q. Where do you reside, Mr. Schnee?

A. At the present time, San Francisco.

Q. What is your age?

A. Twenty-eight.

Q. Are you a married man? A. Yes.

Mr. Thompson: I object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: Answer. My understanding is he answered yes.

Q. On August 29, 1946, what was your age?

A. Twenty-five..

Q. What is your birthday?

A. September 20, 1921.

Q. Directing your attention to the 29th of August, 1946, [4] it has been stipulated you were engaged as a Signal Maintenance Man, is that correct?

A. Yes.

(Testimony of Adolph J. Schnee.)

Q. For the Southern Pacific Railroad Company, the defendant? A. Yes.

Q. Now, Mr. Schnee, where was your headquarters in that capacity?

A. The divisional headquarters was at Tucson, Arizona.

Q. And out of what yard or place did you work? What was your home base, if we may call it such?

A. Willcox, Arizona.

Q. And that is the city that is some eighty-five miles distant from Tucson, is that correct?

A. Yes, sir.

The Court: Which way?

Mr. Gillen: I think it is due south, is it not?

The Witness: I think it is in an easterly direction.

Q. An easterly direction from Tucson. Would that be railroad west from Tucson?

A. No, I think it is railroad east from Tucson.

Q. Are you familiar with motorcars, so called, used in railroad work? A. Yes, sir.

Q. Will you describe, as best you can, from your recollection what a railroad motorcar looks like?

A. To begin with, it has got four wheels for traction on the rails.

Q. Are they flanged wheels, they fit like a railroad wheel?

A. The flange on it is a lot less in size than on a normal railroad car.

Q. I say it is a flanged wheel?

A. It is a flange, slightly flanged.

(Testimony of Adolph J. Schnee.)

Q. All right.

A. And on the axles upon which the wheels turn it mounted a frame.

Q. Mounted the frame.

A. The frame of the vehicle. I do not recollect whether the frame is iron or steel or wood, it has been a long time. And in the frame is mounted a small horsepower engine. I would think it is around a horsepower, around that, perhaps less; and around it is built a sort of hood to cover the moving parts from the top, but the bottom is completely open.

Q. Underneath the car?

A. Underneath all the moving parts are open in order to turn the car over to look at it, to inspect it, and alongside of this hood are sunken platforms, that is, they are constructed, I believe, to serve as a tool well.

Q. Tool well?

A. I term it that. I forget the correct term.

Q. Pardon me, are those two tool wells on either side of the [6] superstructure?

A. On either side of the structure. In addition, I believe at the end of this platform or sunken well is a vertical projection something like a board; whether it is a board or a steel plate——

Q. A partition?

A. A partition, yes. And in addition, directly above the wheel are small incidental fenders. Now the various gadgets to operate this car, to start it

(Testimony of Adolph J. Schnee.)

with or to stop it, are to be gained access to from the seat of the operator and they are located in the middle of this hood or structure. In addition, there is mounted on the front frame—it is a frame, I believe, that is in the front as well as in the back—that is constructed from one side, that is, from one end of one platform over the hood or structure or above it to the other side. I don't think it is in a circular fashion, it may be square, and on the front end of the car, the radiator end, there is an enclosure, I forget whether it is canvas or wood, stretched on this frame or mounted on this frame and on the frame is a light directly in the center somewhere thereabouts to assist you on jobs you go to at night; in addition there is a small rear light.

Q. Also mounted on the frame?

A. Also mounted on the frame.

Q. I see. [7]

A. But to the rear, to my recollection, there is no enclosure other than the plates or wood partitions I spoke of and there is various standard equipment supplied with each car to be used in case of emergency. I believe there are flares contained in these boxes attached to these frames, back and front, and a flag, I believe.

Q. Now, the car can be operated in either direction?

A. The car can be operated, in fact, it is so constructed to make the operation not only possible but I believe I have seen it used that way many, many times before I was elected to this job.

(Testimony of Adolph J. Schnee.)

Q. Now, you have in mind, do you, the date of August 29, 1946, as the date of the accident?

A. I do.

Q. Did you work as a Signal Maintenance Man on that day? A. I did.

Q. What time did your call of duty commence on that day, if you remember?

A. I think it was 8 o'clock.

Q. Eight o'clock in the forenoon, morning?

A. Eight o'clock, yes.

Q. When was your scheduled lunch hour on that day, if you can recall?

A. From 12 to 1 o'clock.

Q. From 12 to 1 o'clock; did you busy yourself about your [8] employment as a Signal Maintenance Man that morning? A. I did, sir.

Q. All right. Now, did you go to lunch that day?

A. I did.

Q. You returned from lunch, I take it, in the neighborhood of 1 o'clock?

A. At 1 o'clock, before working hours started.

Q. Now, directing your attention to the time when you returned from lunch, approximately one o'clock or a few minutes before on August 29, 1946, can you tell us what, if anything, you did with relation to picking up and continuing your employment, your work that day?

A. Immediately after finishing my lunch and starting out at 1 o'clock I proceeded to my motor car, the motorcar assigned to me which I had secured

(Testimony of Adolph J. Schnee.)

or parked directly in front or back, I don't know which is front, of a box car the company provides for a maintainer to live in or use as living quarters, whereupon I walked about the car to see that I had all my tools in it to see that the sweeps—I put them down.

Q. Will you explain what the sweeps are?

A. The sweeps are attached to the radiator end of this motorcar.

Q. What do they consist of and what are their functions?

A. It is merely a rod extended across in a horizontal position and at the end of this rod there is mounted a rubber [9] hose that is on each end; the rubber hoses are pieces around four to six inches long and perhaps an inch and a half in diameter. These rubber hoses are mounted on this rod permanently. In other words, as you turn the rod the bushing is mounted on the frame, as you turn it, this rod, you would also turn, of course, the rubber hoses, they would move in a circular fashion along with the rod.

Q. I see. Now, coming to your car you walked around your car and made an inspection of it, is that correct?

A. Yes, sir.

Q. Then what did you do?

A. Upon seeing that everything was in shape and did have the tools in place in the tool wells that I intended on using—I believe there is some permanent equipment on there, namely, rags and such in

(Testimony of Adolph J. Schnee.)

it, make sure they were closed and I had my schedule and so on.

Q. What was your schedule, a sheet that indicated to you what particular signals you were to visit?

A. I had a schedule made out that would more or less give me something to go by to do various jobs, yes. I put these sweeps down, because normally when you park this car you leave it in an upright position because when you go across a switch or frog from one track to another at times they move out of position.

Q. So you put the sweeps down? [10]

A. Yes, sir.

Q. Then what did you do?

A. So I did not mount the motorcar, I pushed it through this switch, I think it was a second siding from the main line, very small track in length.

Q. All right.

A. From there I went onto the siding that is the second siding, the one immediately parallel to the main line.

Q. All right.

A. And from there I proceeded along this siding until I reached the end of it and again pushed the car onto the main line.

Q. All right, at what point did you reach the end of that siding immediately parallel to the main line?

A. The point is railroad west of Stewart Street, I believe, it has been a long time.

(Testimony of Adolph J. Schnee.)

Q. Is it railroad west or railroad east of Stewart Street?

A. This point of the block signal may be east of Stewart Street.

Q. In all events you reached that signal. Now, is there a crossover switch from the siding to the main line?

A. At each of these crossovers the point going from the siding to the other parallel siding of the main line onto the main line is a hand switch with a lock attached to it.

Q. Did you push your car onto the main line track? [11]

A. I pushed my car onto the main line track.

Q. What did you do then?

A. I forgot to mention while going along this parallel siding I had started the motor of the car.

Q. Then what did you do then when you got to this crossover track and pushed it onto the main line?

A. I did, of course, mount the car, that is, take the seat that is provided and I forget now—I don't think you have to push it once the motor is running. It is a belt drive and you guide it as you pull a lever towards the operator.

Q. Did you start up the operating of the car sitting in a position?

A. I started the operating of the car while being on it.

Q. Which way were you headed at that time?

A. I was heading railroad east.

(Testimony of Adolph J. Schnee.)

Q. Which way was your car heading at that time, was the front or back toward railroad east?

A. The front end, radiator end as I mentioned before was headed railroad east.

Q. In other words, the car was headed in the direction in which you were going, is that correct?

A. Yes, sir.

Q. Did you proceed to any point before stopping?

A. Did I proceed to any point before stopping?

Q. After you started you said you got on the main line, [12] started to operate your car, put it in gear, if that is what you call it; did you reach any point before stopping the car?

A. Of course I went out to this signal in question.

Q. All right. Can you identify the signal in any way for us? A. I cannot recall the number.

Q. Can you give us the approximate distance of the signal from the Willcox yard from which you started?

A. I believe the distance was somewhere between one and two miles railroad east.

Q. One and two miles railroad east of Willcox?

A. Willcox.

Q. All right. At that signal what, if anything, did you do?

A. When I arrived at the signal of course the first thing I did was stop the motor of the motorcar, put on the brakes and dismount the car. I dis-

(Testimony of Adolph J. Schnee.)

mounted from the car and went to the signal immediately adjacent to the tracks—and I don't believe I had to unlock this box.

Q. The box on the signal pole?

A. Yes, because I had been at this or looking at it or stopping by this box, I think, during the course of that morning and I had known—no, I didn't either, I unlocked this box.

Q. All right. You unlocked the signal box.

A. I unlocked the signal box.

Q. All right, then what? [13]

A. I went to assure myself of the lightning arresters being in the hole. I might have to explain this.

Q. Explain what lightning arresters are.

A. Lightning arresters are a small disc from one side, from the flat side looking at it, with a hole in it and it is about, oh, I don't know, a quarter of an inch or half an inch thick and it is constructed of carbon and you use it, I believe, to protect your relays in different electrical mechanisms that make up the signal, railroad signal, as you commonly see it along the line. And the reason I did that was because at that time there had been storms out there, lightning, rain and so forth and it is a precaution I took to keep from having operational trouble of the whole mechanism.

Q. By the way, what was the condition of the weather that afternoon as you started out on your first trip to this signal?

(Testimony of Adolph J. Schnee.)

A. I think it was drizzling.

Q. Drizzling? A. Yes, sir.

Q. That is your best recollection?

A. That is my best recollection.

Q. Was the ground damp?

A. Well, I couldn't say that because I was mainly traveling on a railroad bed and it is hard to determine looking at the countryside whether it was wet or not, but it was drizzling when I started out, I remember that. [14]

Q. When you inspected the lightning arresters on that signal, what, if anything, did you observe or do about it?

A. Of course the first thing I wanted to do was get this material I needed, that is the lightning arresters, from the motorcar and at the same time move it off the tracks.

Q. Did you discover anything wrong with the arresters on that signal?

A. Oh, yes, I forgot to mention.

Q. What did you discover?

A. I believe there was one, two or three, I forget the number, of defective arresters which I wanted to replace immediately when I saw they were defective, cracked.

Q. By the way, do you use any particular kind of tool to install or replace such an article?

A. Yes, you have got to have a special cylindrical tool with a hexagon on the inside of it or each end, one of which fits, I don't know what, a three-eighths

(Testimony of Adolph J. Schnee.)

or standard anyway, and the other fits a smaller nut. The reason you have to have a cylindrical tool, these lightning arresters are mounted in banks and each specific support, of course, is locked next to the next one and to get in there you have to have that cylindrical tool.

Q. Upon discovering three defective arresters, these insulator plates you talked about or gaskets, cylinders, you set about to replace them? [15]

A. I set about to replace them, in fact, I went so far as to loosen the lock nut. See, there is two nuts holding the wire in place where they come into the support onto this bank and there is one nut, I believe, on the very base of this stud, or screw, sticking out of the mounting and the wires have a lead soldered to them and slipped onto this stud and, of course, would be away from the base of the bank. On top of this lead is a nut with which you tighten the wire to the base nut, clamp it together and on top of this second nut is a third one, I believe I mentioned about this lower one. This top one served to lock it.

Q. You loosened that?

A. I loosened that, I am sure.

Q. What did you next do?

A. I had in mind getting to the car, getting the material and taking the car off the tracks and getting to the job.

Q. Did you go to your car?

A. I did go to my car.

(Testimony of Adolph J. Schnee.)

Q. Did you make any inspection to determine whether or not you had the material you needed?

A. I looked for the material, I thought that I had it in place where I usually carry it and some nuts to fit this various equipment, because sometimes you drop them between the battery or inside where you are working in the box of the signal—— [16]

Q. Let me interrupt you. Without going into the mechanical aspects of it you made a search to replace the defective ones?

A. Yes, I think I had some kind of container in my tool box where I had a lot of this little stuff in there in case I dropped one in the grass.

Q. All right. Did you look all over your car?

A. I looked in there; I couldn't find one. I thought I had it in there; when I didn't find one in this container or in the tool box I wanted to look around, that is, I inspected the tool wells on each side of the car and I even went so far as to look in some of the containers they have to keep the rags in, I think there is a box in the back.

Q. Were you able to find what you were seeking?

A. No, sir, I couldn't find it.

Q. Had you taken your car off the track up to this time?

A. No, I had the car on the track right near the signal. I may say at this time I was also keeping a good lookout, a good lookout for any movements, you see, of the trains, because that is important.

(Testimony of Adolph J. Schnee.)

Q. That is, the appearance or approach of a train? A. That is right.

Q. When you found you didn't have these parts you needed what, if anything, did you do then?

A. Then I got on the car. First of all I released the brake because you can't budge the car until you release the [17] brake and I mounted—no, you don't mount the car, you have to push it. You start it by running alongside the car—no, by running directly aft between the rails to push it in that manner, since it is unsafe to do that.

Q. Did you do that? A. Yes, sir.

Q. That was to get it started? A. Yes, sir.

Q. Which way did you push your car, toward Willcox again?

A. Towards Willcox, yes, sir.

Q. That would have been railroad west?

A. Railroad west.

Q. Which way was your car facing when you started to push it toward railroad west, toward Willcox to get the parts?

A. The car would be facing towards Bowie, that would be railroad east, yes, railroad east.

Q. In other words, you were backing up to Willcox, is that correct? A. Yes, sir.

Q. Did you board the car and drive back to Willcox?

A. After I had the motor running you stop the car after the motor is running and mount it.

Q. You mounted it and backed up to Willcox, drove it in reverse into Willcox, is that correct?

(Testimony of Adolph J. Schnee.)

A. Yes, you call it reverse, I suppose. [18]

Q. So that the front of your car was still facing railroad east, the back was facing railroad west and you were traveling at this time railroad west, is that correct?

A. Yes, sir, toward Willecox.

Q. When you got back to Willecox did you retain your position on the main line rail with the car or put it on any other rail?

A. I didn't maintain my position, as you put it, on the main line, because the tool shed is adjacent to a siding, one that there isn't any traffic on, and the way I did this was to take advantage of a cross-over, that is a rail that takes off from the main line onto the siding and I stopped there. Of course, first you have to get off and I left the motor running and I pushed it through this switch—there is a switch too—yes, I pushed it through the switch onto this siding, then I mounted the car again—but before I did I noticed—of course, I made it a habit to notice that the spark——

Q. Leaving the mechanical details out, did you finally get it to the tool shed?

A. Yes, sir, I went from there directly on this same siding that goes right along the front of the station, the Willecox station and right past the station going towards Tucson is the tool shed or work shed where I keep the equipment.

Q. Did you park anywhere in the close proximity to that [19] tool shed?

A. Directly in front of it.

(Testimony of Adolph J. Schnee.)

Q. That was on the siding? A. Yes, sir.

Q. Was that the siding immediately parallel to the main line? A. Yes, sir.

Q. Did you go into the tool shed?

A. I did go in the tool shed, yes, sir.

Q. Did you find any articles there you needed?

A. Well, the reason I did go on the siding first——

Q. Just a moment, answer my question. Did you find any articles you needed in the tool shed?

A. Yes, sir, after I made a search.

The Court: We will recess until 1:30.

(Whereupon a recess was taken at 12:00 o'clock until 1:30 o'clock p.m.)

The Court: Do you have the marshal and others from Douglas available?

Mr. Gillen: Yes, sir, and I have some depositions, so we won't lose any time.

The Court: The way I feel now I think we should try the cause of liability first and after that aspect you can put your other witnesses on.

Mr. Gillen: Interrupt the witness' testimony as to [20] any injuries?

The Court: That is right.

Mr. Gillen: Then I might have to have a moment to phone, because I was planning those witnesses at a reasonable hour.

The Court: That is what I was planning on, have your colleague call them so we can get along. Of

(Testimony of Adolph J. Schnee.)

course, your people for the defense will be here all the time?

Mr. Henderson: Yes, sir.

Mr. Thompson: I don't have them in the corridor, Your Honor, but I can have them here in five minutes.

(Last question read.)

Q. (By Mr. Gillen): Did you take the supplies you needed and start out again? A. Yes.

Q. Railroad east back toward the signal you were going to work on? A. Railroad east, yes.

Mr. Thompson: Your Honor, I don't want to interrupt counsel, but I wish he would refrain from leading.

The Court: He is going all right. I give plaintiffs lots of leeway.

Mr. Gillen: I wish to avoid detail.

The Court: Put it another way.

Q. (By Mr. Gillen): Which way was your car headed when you [21] started back to the signal from Willcox?

A. The radiator would be the front, headed railroad east.

Q. The front would be headed railroad east?

A. Yes, sir.

Q. Do you have any recollection now by which you could form an estimate as to what speed you were traveling just prior to the time the accident occurred?

(Testimony of Adolph J. Schnee.)

A. Oh, I would say around seventeen miles an hour as best I can judge.

Q. About seventeen miles an hour?

A. That is right.

Q. Now, what were you doing as you were traveling along railroad east with your car headed that way, about seventeen miles an hour, approaching that signal, with relation to making any observations, anything of that sort?

A. Well, of course—you mean from the time I got on the car?

Q. No. We have got you now on the road away from Willcox traveling about seventeen miles an hour, your car traveling in a railroad easterly direction and you are approaching or going toward the signal you are going to work on. A. I see.

Q. What were you doing as you drove, tell us where you were sitting, what you were doing

A. I was sitting on the seat provided for the maintainer, [22] which is on the left-hand side in this case facing east or facing with the front end of the car, east.

Q. All right.

A. And I was watching the railroad signals.

Q. Why were you watching the railroad signals?

A. It is an indication if there are any trains approaching.

Q. What else were you doing?

A. In addition to that I was watching the horizon for smoke, which is also an indication for trains approaching.

(Testimony of Adolph J. Schnee.)

Q. Were you watching anything else?

A. Well, of course I was watching making sure that the track was clear.

Q. All right. Now, as you were proceeding along in the manner you have described at the speed you have described, did anything of an unusual nature come to your attention by way of sensation, noise, movement or anything else? Answer that yes or no.

A. Yes.

Q. Will you just describe for the Court and Jury what it was that occurred that came to your senses of feel or sight or hearing or whatever it was?

A. Well, the sensation I had, the last sensation I had before I don't remember anything was a jolt, a jar, an abnormal movement of the car.

Q. When you say an abnormal movement of the car, can you [23] describe it?

A. It felt as though it was leaving the track or not running on the track just for an instant.

Q. I see. What else?

A. It was merely this one instant I was conscious of.

Q. When you say it was leaving the track, did your sensation indicate to you that the movement of the car was to one side or to the other, backward, forward or up?

A. It was up more than sideways, instead of sideways movement. You generally always have sort of a fishtail's movement.

Q. Let me understand, you always have sort of sideways movement, sort of fishtail's. Do you mean there is a sort of sway?

(Testimony of Adolph J. Schnee.)

A. There is plenty of clearance provided, because the weight of the car wouldn't be enough to keep it on the track even with all the traction it would scrape the car, the wheels from either side.

Q. So there is some side to side play in the car as it goes along normally; you say this was a different sensation, more upward than anything else?

A. Up.

Q. Can you describe that any better for the Court and Jury?

A. I think it something like coming up the other side of a dip in an automobile, you feel like you are going to stay [24] up there.

Q. You lifted? A. That is right.

Q. Did you lift, the car lift altogether, what was your sensation?

A. Naturally I was sitting right on the car. It sort of came from the bottom, that is, pressure, a sudden jolt caught me from the bottom like somebody pounding on this chair and lifting it up.

Q. The car lifted? A. It felt like that.

Q. What happened to you, if you know?

A. To me?

Q. Yes. What was the next sensation you felt or what other sensation did you experience, if any?

A. The sensation I experienced of arousing from a sleep.

Q. Now, before we get to that, when you felt the car jolt and lift were you conscious of leaving the car or were you conscious of falling to the ground,

(Testimony of Adolph J. Schnee.)

being thrown to the ground, being thrown in the air, anything else?

A. No, sir. No, sir, I felt as though at the time that the instant I was sitting on the car there as though I was moving sideways or one way or the other. I felt a jolt coming from the bottom up, a lifting sensation.

Q. Do you remember any more until you recall a sensation [25] as though you were arousing yourself from sleep?

A. That is right. No, I don't recall anything between that and the last sensation I just described, that jolt.

Q. Were you blacked-out? Were you unconscious so far as you know?

A. I must have been.

Q. Do you know how long you were unconscious before you felt yourself rousing?

A. I myself couldn't say.

Q. You say the next sensation after the bump and lifting sensation you describe while you were sitting on the car traveling along, was a sensation such as one feels when coming out of a sleep?

A. That is right, with an effort.

Q. Outside of coming to consciousness did you feel any other sensation in the way of discomfort, pain, or anything else?

A. Sure. I tried to get up then, I had the pain in my ankle, of course.

Q. Which ankle is that?

(Testimony of Adolph J. Schnee.)

A. This right ankle, that I experienced after I tried to get on my hand. I remember lying down, trying to get on my hand and right there I experienced pain.

Q. Where? A. Right in this hand.

Q. You were indicating the left hand?

A. Left hand.

Q. All right.

A. Then I tried to arouse myself; by doing that I tried to get on my left knee; the pain there was so terrific I couldn't get on the left, I don't think I was able to bend it.

Q. Your left knee gave you pain?

A. Yes, sir.

Q. All right.

A. Naturally I couldn't get up.

Q. What other sensation did you experience?

A. I felt as though I wanted to go back to sleep. I couldn't hear noises, that is, I felt by moving around I was moving in a vacuum. I couldn't hear the noise I was making from disturbing the gravel, ground or bushes, whatever it was; that seemed strange to me. Also, my eyesight failed me quite a bit, everything looked blurry to me.

Q. By the way, let me interrupt you. Prior to the accident on August 29, 1946, did you wear eye-glasses? A. No, sir.

Q. Had you been examined by the railroad? Had you had a physical examination by the railroad?

A. Yes. With the physical examination they give you an eye test.

(Testimony of Adolph J. Schnee.)

Q. Were you given a physical examination at the time you [27] were employed by the railroad?

A. Yes.

Q. How long before this accident was that, two weeks, a month, two months?

A. Two months and some odd days.

Q. Two months and some odd days prior to the accident?

A. Yes.

Q. Do you know what your vision was the last time you had your eyes tested?

A. I believe it was 20/20.

Q. Do you know?

A. Yes. Yes, because I think that was one of the requirements. If you didn't have that you had to have glasses. I know when I left the service I had 20/20 because they give you a thorough examination.

Q. You say your eyesight was blurred; did you experience any other sensation?

A. Well, my head felt like someone pounding it with a sledge hammer.

Q. Was it painful?

A. Not a sharp pain, felt like a dead weight on it.

Q. No sharp pain. Was it a dull pain?

A. Dull and pressure all over.

Q. Did you note anything about your mouth at that time?

A. Felt I couldn't move my body—— [28]

Q. Did you note anything about your teeth at that time?

A. No, sir.

Q. Did you subsequently note anything about your teeth?

A. Yes, sir.

(Testimony of Adolph J. Schnee.)

Q. What did you note about your teeth?

A. About a week after the accident I found out I was minus four teeth.

Q. Uppers, lowers or where?

A. One and a half uppers and two lowers.

Q. You have described to us your head felt as though there was a weight on it; and if I am not mistaken you said there was a dull pain but not a sharp pain in your head, is that right?

A. Yes. I think it was a general pressure pain; not in any particular one spot.

Q. As to your neck and shoulders, did you feel any sensation in your neck and shoulders either at that time or within the next little while?

A. Not within the next little while.

Q. All right. With relation to your hands did you notice any discomfort with either or both of your hands?

A. Yes, as I mentioned.

Q. With relation to your abdomen did you notice any discomfort about your abdomen?

A. Yes, I felt as though someone had knocked me a good [29] wallop in the stomach.

Q. Did you feel any sensation about your lower extremities, any discomfort?

A. At that time the only thing, I felt like I had been beaten up all over and these sharp pains and the feeling of extreme pain never came until three weeks after and has lasted ever since in various parts of my body.

Q. After you observed or noticed these sensations

(Testimony of Adolph J. Schnee.)

you have described here did you make any observations with relation to your immediate surroundings?

A. Yes. I remember coming to, trying to get up and when I couldn't I remember crawling.

Q. How did you crawl? Can you describe to the Jury how you crawled?

A. Yes, on my elbows.

Q. Can you tell us why you crawled on your elbows rather than any other manner?

A. That is the only means of locomotion, so to speak, that was possible.

Q. Why?

A. It was instinctive to me, because anything else I touched, my left hand, foot or anything wouldn't work or would be painful.

Q. Now, when you regained consciousness did you make any observation with relation to what happened or where the motorcar [40] was?

A. I don't know whether I had remained right on it, because I was close. It seemed to me I was near it or at least I could see it when I came to. When I first remember coming to from this sleep I mentioned, seemed like a sleep——

Q. You noticed the motorcar? A. Yes, sir.

Q. Did you form any estimate in your mind where the motorcar was with relation to you?

A. In relation to me it was directly in front of me.

Q. Do you remember whether you remained conscious or lapsed into unconsciousness again or re-

(Testimony of Adolph J. Schnee.)

gained consciousness again any number of times, one or more times?

A. I can. I can remember many times of the same sensation, coming to and feeling a weight and my body dragging me down and feeling like staying there and to heck with everything else.

Q. Do you know what time it was, whether it was on your regaining of consciousness of the first time or some subsequent regaining of consciousness what position the handcar was in on which you had been riding?

A. No. After I first came to and seen the car, especially in my mind I knew first when I came to it was a motorcar, was the yellow paint hit me right in the eyes and that was a good perception of anything I seen. [31]

Q. Did you take any note or are you conscious of any recollection as to whether the motorcar, whether it was on that occasion you saw it, regaining consciousness first or some subsequent time, whether it was on the track or anyplace else?

A. It couldn't have been on the track.

Q. Did you notice? A. I didn't, sir.

Q. You say you started to crawl on your elbows, use your elbows to propel you along the ground?

A. That is right.

Q. Did you notice anything with relation to any blood on you or about you when you first came to?

A. My color perception was pretty poor; my face was caked up with something.

(Testimony of Adolph J. Schnee.)

Q. Did you notice whether it was a light or dark substance or did you notice anything on the ground about?

A. The only thing I have a sensation of I think it was muddy, it was ground.

Q. Did anything else come to your attention that caused you to attempt to bring yourself, take yourself in that direction?

A. I tried to take myself in the direction of the motorcar. I remember trying to get to it.

Q. Trying to get to the motorcar?

A. Yes. [32]

Q. Did you ever reach the motorcar?

A. Not to my recollection.

Q. Now, do you remember doing anything else with relation to helping yourself?

A. I gave myself a good talking to.

Q. Do you remember anything else you did?

A. I remember trying to keep awake in every way possible.

Q. Trying to keep awake? A. Yes, sir.

Q. Did any sound or sensation come to your attention that had any significance for you?

A. There is the sound of exhaust from automobiles; there is what sounded like a train.

Q. Sounding like what?

A. Sounding like a train.

Q. What did you do then with relation to assisting yourself any further, when you gave yourself a good talking too, tried to discipline yourself to keep awake, what else did you do?

(Testimony of Adolph J. Schnee.)

A. I remember trying to crawl to the highway, because I had observed it to be parallel to the tracks prior to the accident.

Q. You wanted to get to the highway?

A. That is right.

Q. Why did you want to get to the highway?

A. I felt someone would be kind enough to assist me.

Q. Were you conscious of whether you got to the highway or [33] not? A. No.

Q. You were not conscious whether you got to the highway? A. No.

Q. What, if anything, do you next remember, that you are next conscious of?

A. The first voice I was conscious of was someone, lady or man, I don't recall, saying he was either dead or drunk.

Q. He is either dead or drunk? A. Yes.

Q. You don't know who they were?

A. No, sir.

Q. You don't know whether it was a man or woman's voice? A. No, sir.

Q. What were you next conscious of?

A. I was conscious of two persons talking and I was conscious of someone lifting my head, I believe, and someone trying to move me; of telling them it was extremely painful.

Q. You are conscious of telling someone——

A. I would say hollering.

Q. Hollering you were in pain? A. Yes.

(Testimony of Adolph J. Schnee.)

Q. What were you next conscious of?

A. Next I was conscious of these two persons talking. I couldn't see them although when they, or he, or she lifted my [34] head they must have been right over me. I never saw their faces.

Q. Don't speculate on what happened, just tell us what you were conscious of. Were you conscious of anything else after that?

A. No, I don't remember anything until in the doctor's office someone said hand me some medical instrument, something about blood plasma, someone turning heck out of my foot, working on my ankle.

Q. Do you know where that was, whether in Willcox or whether in St. Mary's Hospital in Tucson, do you know where?

A. It must have been Willcox.

Q. Just a minute. I don't want you to tell me what it must have been, do you know where?

A. No.

Q. You are conscious of someone working on your foot? A. Yes, and my head.

Q. What was the next thing you were conscious of?

A. Moving in a dark room, it seemed to me.

Mr. Gillen: I think, Your Honor, that just about covers the point of liability.

The Court: All right, cross-examine, gentlemen.

I am taking this in hand, gentlemen of the Jury, so we will present what we call the issue of liability first rather than go ahead with these injuries. I am putting that off for [35] a little while.

Mr. Henderson: Under the provisions of the Federal Rules I believe we have the privilege of calling the adverse party and if the Court will permit it I would prefer to do that at this time rather than go ahead.

The Court: On your case.

Mr. Henderson: Yes, sir.

The Court: Do you have another witness available?

Mr. Gillen: Mr. Scruggs has reached the witnesses. They are on the way and should be here momentarily.

Your Honor wishes the plaintiff to step down off the stand?

The Court: I think so.

DICK HALLMARK

being called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Marshal Hallmark, the Jury is to the right alongside of you and I will ask if you will be kind enough to keep your voice up so everybody will be able to hear you.

The Witness: I will be glad to do so.

Q. May I have your full name, please?

A. Dick Hallmark.

Q. May I ask what is your business or official capacity? [36]

(Testimony of Dick Hallmark.)

A. City Marshal, City of Willcox.

Q. City Marshal, City of Willcox; that is in the State of Arizona? A. Yes, sir.

Q. That is a distance from Tucson where we are now about how many miles?

A. Eighty-four miles, approximately.

Q. In what direction?

A. It would be considered generally east, I would think.

Q. As City Marshal you have the capacity of Police Chief or police officer in that community?

A. Yes, sir.

Q. How long have you been such, please?

A. Four years.

Q. Four years? A. Yes, sir.

Q. Were you such in the month of August, 1946?

A. I was.

Q. Directing your attention to the date of August 29, 1946, and I will identify that as a date when you encountered an injured man in the course of your official duties, do you recall anything being brought to your attention about anyone being injured on the nearby highway?

A. Yes, sir. I was standing on the corner there at a Chevron station known as Porter Fox's Chevron Station talking [37] to Mr. Singleton.

Q. Can you tell us who is Mr. Singleton?

A. He is just an acquaintance of mine in Willcox. I have known the man quite a while. He is very well known.

(Testimony of Dick Hallmark.)

Q. One of the citizens of Willcox?

A. Yes, sir, an old timer there, when a car approached very hurriedly and I heard the lady call out, "There is an officer there." Naturally I stepped over to the car to identify myself; she said, "For God's sake, quick, officer, there is a man out here, I don't know what has happened, looks like he is torn all to pieces. He is all covered with blood." I said, "How far out?" She said, "About a mile and a half." My car was standing handy.

Q. Were you wearing some badge of your official position?

A. Yes, my full gear and badge of identification.

Q. And a weapon on your person?

A. Yes, sir.

Q. All right. I don't want to get into hearsay as to what was said between you and Mr. Singleton out of hearing of any representative of the defendant company, but as the result of this information that was given to you did you proceed to the scene?

A. I did, immediately.

Q. Were you accompanied by anyone?

A. I asked Mr. Singleton to accompany me in case I needed [38] assistance.

Q. You went in your own automobile?

A. Yes, sir.

Q. How were you directed to the scene?

A. I followed this couple out, this tourist, I followed them out to the scene.

Q. In other words, they led the way to lead you to the point? A. Yes, sir.

(Testimony of Dick Hallmark.)

Q. Arriving at the scene what, if anything, did you observe? What first came to your attention when you arrived at the scene?

A. A man, as I figured, with no chance of life.

Q. I see; why do you say that?

A. Because the man was all covered in blood, a terrific hole in the top of his head and his limbs were in such condition I figured they were broken up pretty badly and all I could get from the man was a moan. I seen there was life and I asked for an ambulance.

Q. How did you ask for that ambulance?

A. I sent this same party assisting me, asked them to go back with him. The reason they went back with me, this lady says the man is in the tall grass and you might miss him and I know right where he is, which is true, the grass is some eighteen or twenty inches high. It was very hard to see the [39] man if you didn't know where he was. I asked them to hurry back and send me an ambulance at once.

Q. In other words, you dispatched your informants back to Willcox to get an ambulance?

A. That is right.

Q. When they left to get an ambulance what, if anything, did you do?

A. The first thing I did, Mr. Singleton and I broke down sufficient grass to raise the boy's head up to a level with his body, due to the fact that the ground is very unlevel there and his head was way

(Testimony of Dick Hallmark.)

low. I think I tried to move him over to a more comfortable position and he gave an outcry of pain and we broke down sufficient grass to raise his head to a level with his body.

Q. That is a makeshift pillow? A. Yes, sir:

Q. What, if anything else did you do then?

A. I saw the direction from whence he had come, due to the drag where he had dragged himself along like a wounded animal through the grass and mud. The ground in the lower places was filled with water, it had rained that afternoon. I looked over to the railroad track and I observed this motorcar; from where I was at the time I didn't know the position exactly and I turned to Mr. Singleton—I looked to the east and a passenger train was coming down the hill about a mile and a half or [40] two miles away and this car would be partially hidden, I was afraid, by a clump of brush, bushes; I said to Singleton, I said, "You make the boy as comfortable as you can and I will go over and see if that car is in the clear, I believe that is where the accident occurred."

Q. See if the motorcar was clear of the track so it wouldn't interfere with this train you saw coming?

A. That is right. I was afraid the bushes would hide the car until it was close and the engineer wouldn't have time to stop the train. Upon arriving at the scene I saw the car was in the clear where the train could pass.

(Testimony of Dick Hallmark.)

Q. May I interrupt you, Mr. Hallmark. You say you saw the car was in the clear, you mean by that it was completely off the main line track?

A. Yes, sir, completely off the track.

Q. All four wheels resting on the soil alongside the right of way. A. Yes, sir.

Q. Pardon me for interrupting you. What, if anything, did you do then?

A. I rushed back, I heard the ambulance, heard the siren coming and I rushed back and assisted them in loading the boy in the ambulance.

Q. Did you know that young man before that day?

A. I had only seen the boy working on the line there. I [41] hadn't been introduced to him, no, sir.

Q. After you had loaded him into the ambulance with the assistance of others what did you do then?

A. I gave directions where to take the boy and I turned to Mr. Singleton, I said, "Come go with me over and let's kind of check." I said, "That is, I am pretty sure, where the accident occurred."

Q. Did you and Mr. Singleton go back over to the location? A. We did, sir.

Q. Will you just describe what, if anything, came to your notice and attention at that time?

A. Well, in following the tracks back from the car, which is something you always do in an accident, you try to find out the cause of the accident if possible.

Q. Yes, sir.

(Testimony of Dick Hallmark.)

A. We followed it back, I think it was seventy-three crossties.

Q. Seventy-three crossties?

A. I believe that was the correct number. It has been so long ago I might make a mistake as to the number, but it was quite a ways back; and I had seen where the car left the tracks to the north. The car was traveling east or generally eastward at that point—it may not be directly east and west; it is considered east, and it angled up the tracks. We could follow the flanges where it hit the crossties. [42]

Q. You say the flange, you mean the flange of the motorcar had left its mark on the crossties?

A. Yes, sir.

Q. The wooden crossties?

A. Yes, sir. You see, it left the track to the left as it was going east and they angle up the track, it must have been some sixty-five, perhaps, ties.

The Court: Straddling the north rail?

The Witness: Yes, sir, it was straddling the north rail at that time and at that point. I don't know the exact figures, but it was in the neighborhood of sixty or sixty-five ties from where it left the track, the right wheels apparently came into contact with the bolts that fixed the rails together and the fishplate.

Q. Hold them together?

A. Yes, sir. They are alternated, you know, one head being one way and the other head the other

(Testimony of Dick Hallmark.)

way and apparently the wheel of the motorear struck this bolt and it threw the entire car then to the left of the track or north of the track, being the right wheels over the left rail and leaving the car completely off the track to the left and it proceeded, oh, the best I can recall twenty-five or thirty feet before it came to rest. And directly across from where the car was resting, I believe almost even with the front of the car as I term it, I noticed a puddle of blood and in observing I saw that was [43] apparently where the boy's head had struck a fishplate where it was protruding out over the crossties. I am sure that catapulted, it catapulted the boy from the handcar and naturally proceeded in the direction he was going and it looked as though his head struck directly against the rail and this protrusion of that fishplate, whatever they call them under the rails, resting on the ties, the corner was sticking out between an inch and an inch and a half. It was overhanging this side of the rail.

Q. I see.

A. Then from signs of blood, of course, there was ballast there; by close observation you could see where there had been some of the ballast turned over. He dragged himself back, oh, I believe I would be safe in saying thirty feet along the south rail back to the west. He crossed directly over to the north of the north rail. Anyhow, he was dragging himself, you could see where he clawed in the ground with his fingers and pulling with his elbows

(Testimony of Dick Hallmark.)

back to the car, right to the handcar or motorcar and there then he turned northward to the highway, a distance of, I judge, around nine hundred to one thousand feet. He dragged himself through the grass going through or under highway fences in a zigzag way over to within five feet of the shoulder of the highway. He was in the bar pit lying in the grass right near the bar pit. You could trail him by the blood where he had dragged himself through the mud. [44]

The Court: What time was this?

A. It was in the afternoon. I don't recall the time, but it was in the afternoon, I imagine around four o'clock. I don't recall the exact time, sir.

Mr. Gillen: Around four o'clock in the afternoon. Now, did you observe anything that indicated this substance, other than your perception of it, that indicated this substance was blood? Did you observe any rodents or animal life?

A. Yes, I did.

Mr. Thompson: I object, Your Honor, for leading.

The Court: Sustained for another reason. Ask another question. You know it was blood, Marshal? You know it was blood?

A. To the best of my ability, Your Honor, it was.

The Court: You said nine hundred to one thousand yards in your statement awhile ago; you meant feet?

(Testimony of Dick Hallmark.)

Mr. Gillen: I did, Your Honor.

The Court: Let's straighten it out.

Q. (By Mr. Gillen): Can you tell us your approximation after he left the handcar whether his trail was one thousand yards or one thousand feet?

A. Feet.

Mr. Gillen: I stand corrected.

The Witness: That is in a direct line. Of course, he didn't crawl in a direct line. He would swerve backward and [45] forward as he was pulling himself along.

Q. The trail was irregular?

A. Oh, yes, the trail was irregular. He didn't go in a direct line.

Q. Did you observe anything else around the scene of the accident?

A. Naturally, having a lot of experience with accidents you look around to see what should be taken care of and what shouldn't. I found on the track what appeared to me to be a time book and another bunch of papers or writing of some kind. I imagine it was records of his labor or such as that. I picked those up and laid them on the motorcar.

Q. Anything else?

A. Well, I was trying to ascertain, if possible, what caused the accident.

Q. I see.

A. I found laying alongside the north rail what I took to be a grade stake.

Q. A grade stake? A. Yes, sir.

(Testimony of Dick Hallmark.)

Q. Can you tell us approximately what it looked like?

A. It is a square stake, one end is sharpened. It is about an inch and a quarter by an inch and a quarter and they vary in length. I don't recall the exact length of this one; I imagine it was around fifteen, between fifteen and eighteen inches in length. And along the rail I noticed some splinters [46] and from the end of this grade stake, as I termed it, it looked like it had been burred or hit on the end by a hammer.

Q. The grade stake was damaged in that way?

A. On the sharpened end it seemed as though it was burred, been hit by a hammer and the splinters were strewn along, I believe, oh, three or four ties, just small splinters.

The Court: Tell us just where you found it.

A. I found it south of the north rail.

The Court: Where with reference to where the car left the track?

A. That was within about four ties of where the car left the rail.

The Court: Where it jumped the track?

A. Yes, sir. It was up the track about three or four crossties, as best I recall.

Q. Were there any markings on it like grade stakes usually have, surveyors' markings?

A. No, sir, it hadn't been marked.

Q. Was it bright wood?

(Testimony of Dick Hallmark.)

A. Looked like oil, where it had lain on the track somewhere. It had oil on it.

Q. (By Mr. Gillen): Now, I want to see if I can clarify a point. Now, in answer to a question asked by His Honor, you said three or four ties from where it had left the track. You mean by that from where it had completely left the track or [47] first left the track?

A. No, where the first wheels left the track. You might say the first tie that had the imprint of the flange, just north of the south rail, the grade stake was lying in that proximity, just a very short distance.

Q. In other words, the first three or four ties that showed the indentation were imprint of the flange of the wheel of approximately the seventy-three ties you observed with the imprint on them?

A. That is right. And that also showed the small splinters just south of the north rail and this grade stake was lying just south of the north rail.

Q. Was that an unpainted or painted grade stake? A. Unpainted.

Q. And you answered His Honor it had some evidence of oil on it? A. Yes.

Q. Did it have any evidence of anything of a corrosive nature on it? Withdraw that. Did you disturb that grade stake at that time?

A. No, sir. I just called Mr. Singleton's attention to it and remarked, I said, "That is what threw it off the track." He said, "Yes, possibly."

(Testimony of Dick Hallmark.)

Q. Did you observe anything else around there or did you do anything with anything else around there at that time? [48]

A. I picked up some tools, wrenches, oil cans, a water bag, you know, just something——

Q. Where did you place those things?

A. I placed them back on the motorcar.

Q. Back on the motorcar?

A. Back on the motorcar.

Q. But you did not disturb the grade stake?

A. No, sir.

Q. What did you do after that, Mr. Hallmark?

A. I went to the S. P. Depot in Willcox; from there went back over the——

Q. Did you—I beg your pardon.

A. I went from the scene of the accident back to the S. P. Depot to report the accident.

Q. Did you encounter anybody there?

A. I did.

Q. Who was it you encountered there?

A. I forget the gentleman's name at this time, there has been so many of them. I can't recall his name, but at that time as I understand it, he was kind of in charge of these Maintenance Men, or something.

Q. Of what?

A. I believe his name was Ward.

Q. Mr. Ward?

A. I believe it was. I wouldn't be positive. [49]

Q. Did Mr. Ward do anything with you at that time?

(Testimony of Dick Hallmark.)

A. He and I went out to the scene of the accident.

Q. Did Mr. Singleton accompany you two?

A. Yes, sir.

Q. So Mr. Ward of the Southern Pacific Company, you and Mr. Singleton returned to the scene of the accident, is that correct? A. Yes, sir.

Q. Now, what did you do when you got out there with Mr. Ward?

A. He looked over the ground himself and we discussed distance, markings. I called his attention to this grade stake; I said, "Don't you believe that caused the accident?"

Q. Mr. Hallmark, we are not supposed to give hearsay testimony. Did you do anything with relation to turning the grade stake over to Mr. Ward?

A. Yes, sir, he picked it up.

Q. He did what?

A. He piked the grade stake up.

Q. Did you cover fairly what you did then at the scene of the accident with Mr. Ward or was there anything else you did?

A. Well, we didn't tarry very long because he said he wanted to get back and have the car brought in, it was too dangerous to remain out.

Q. Did you get Mr. Ward back to the Willcox depot? A. Yes, sir. [50]

Q. At some subsequent time were you shown any photographs of a motorcar? A. Yes, sir.

Q. By whom were you shown the photographs?

(Testimony of Dick Hallmark.)

A. He was a representative of the S. P. Company.

Q. Where were you shown the photographs?

A. I don't remember the exact place; I believe it was in the S. P. Depot.

Q. At Willcox? A. At Willcox.

Q. Were you shown the photographs with relation to any inquiries made of you or any statement being taken from you?

A. I gave them a statement.

Q. Were you shown the photographs the same time you gave them the statement?

A. No, sir, I was shown the photographs later.

Q. You were shown the photographs later?

A. Yes, sir.

Q. You were requested to give a statement, is that correct? A. That is right.

Q. And do you know the man by whom you were requested to give the statement, the Southern Pacific representative?

A. No. I had never seen the man before.

Q. Can you fix the time with relation to the accident?

A. It was the next day, I think. [51]

Q. The next day?

A. I believe it was the day following the accident. It wasn't more than two days.

Q. It was either the next day or two days following the accident?

A. Yes, sir, the best I recall. As best I recall I think it was the first day.

(Testimony of Dick Hallmark.)

Q. In what manner was the statement taken from you?

A. Well, we went into the S. P. Depot and he wrote down the statement as I made it.

Q. Did he read you back what he wrote down or permit you to read what he wrote down?

A. He read it back to me.

Q. Was there any portion of the statement you disputed at that time? A. There was.

Q. And did you do anything with regard to disputing the statement?

A. Yes, tore it up and threw it in the wastebasket.

Q. Why did you dispute the statement?

A. I told him if he couldn't put the statement down as I worded it to forget it.

Q. What particular part of the statement did you dispute?

Mr. Thompson: I object to that on the ground it is incompetent, irrelevant and immaterial. We don't see any point [52] to it at this stage of the case.

Mr. Gillen: Perhaps that is correct, Mr. Thompson. Perhaps that is anticipating; very well.

Q. Mr. Hallmark, when you observed the marks on the ties on the three times you inspected the scene there, were you able to determine the exact course the car had followed from the time it had left the track? Do you understand my question?

A. Yes. It proceeded in an eastward direction up the track, continued on east up the track.

(Testimony of Dick Hallmark.)

Q. Was there any indication by the markings or anything that the car had ever turned around?

A. No, sir, the car did not turn around.

Q. Which way was the car headed when you saw it?

A. I figured the car was headed ahead. But now I don't know enough about these cars—they will run either way—now, if you can tell me which end of the car the pulley is on that drives it I can tell you which way the car was headed.

Q. I think counsel would be willing to stipulate the driving power or pulley is at the rear.

Mr. Thompson: The witness can say where the pulley was.

The Court: All right, put it in that way, where the pulley was.

A. The pulley was on the rear axle. I say the rear axle, it was on the west end of the car.

Q. Was that west end of the car nearest the place where the [53] car left the rails?

A. Yes, sir.

Q. So that the car was headed in the direction it had come off the rails and proceeded over the ties, over the ground.

Mr. Thompson: If your Honor, please, that is leading, suggestive. I don't see that that is proper.

Mr. Gillen: I don't think that is leading and suggestive at all.

The Court: It isn't important either. Go on and tell your idea about the car, where the pulley was.

(Testimony of Dick Hallmark.)

A. Well, Judge, Your Honor——

The Court: Talk to the Jury.

The Witness: I looked at the car when I first went over there and I ascertained that the pulley or the belt was running from the motor back to the rear end of the car, as I termed it, and when I went back on the second trip—but the reason I noticed that the first trip was to see if I could ascertain anything that had gone wrong with the motor or if anything had dropped loose about the motor to cause the wreck and I also checked the tension on the belt, reached down through the car and checked the tension on the belt. Sometimes a belt can come loose and cause accidents.

The Court: You might state again whether the pulley was on the west end or east end.

A. Yes, sir, the pulley was on the west end. [54]

The Court: You thought that was the rear end?

A. I surmised that was the rear end and in my opinion it was. It satisfied my curiosity—well, I won't make that remark because it was stopped.

Q. Where the car had left a trail that you have described or a marking over the ties to where it came to rest, that was where the pulley was on the rear axle?

A. Yes. The car did not turn on the track, because it is a straight line or marking on the ties to the point where the right wheels hit the bolt on the outside of the north rail, which jumped the right

(Testimony of Dick Hallmark.)

wheels over the rail entirely, putting the car completely off the track. Then it proceeded up the track and came to rest about ten or fifteen, maybe twenty feet after it had completely left the rail.

Q. Is it your testimony it proceeded on the ground parallel to the track?

A. Yes, sir. Of course, it was veering from the track a little as it went.

Q. Veering away from the track? A. Yes.

Q. How many days, if you can tell us, approximately, after the accident was it you were shown photographs of a handcar or motorcar, rather?

A. Oh, I don't think it could have been more than four or five days at the outside. [55]

Q. Was it the same gentleman who had taken your statement?

A. No, sir, it was another gentleman. And I took him out to photograph the tracks. That is how I came to know the man, he wanted to know the exact spot.

Q. He had camera equipment with him?

A. Yes, sir, he had a camera with him.

Q. You took him back to point out the scene of the accident? A. Yes, sir.

Q. That was four or five days after the accident you said?

A. It was three or four days after the accident, I don't recall, but it followed pretty closely.

Q. Did you ever see those photographs again to your knowledge since the time they were shown to

(Testimony of Dick Hallmark.)

you by a photographer for the Southern Pacific Company whom you took out to get the pictures?

A. I haven't seen them since that time.

Q. Do you believe you would be able to recognize those photographs if you were shown them?

A. I believe I would. Photographs can be very deceiving.

Q. Do you recall what sort of pictures they were of the motorcar from the photographs?

A. It was taken from the bottom of the car.

Q. What is it?

A. It was taken of the bottom of the car.

Q. Of the bottom? [56]

A. Evidently the car had been stood up on end, partially on end—I don't know how that was arranged—but it is a photograph of the bottom of the car.

Q. To show the underpinning?

A. The under side of the car, yes, sir.

Mr. Gillen: I wonder if counsel would have any objection to letting us exhibit to this witness their photographs.

(Photographs handed to counsel.)

Mr. Gillen: Thank you. I would like to offer an objection for the record, Your Honor. I was wondering if it might be well to present my objection.

The Court: You can do it when we adjourn, as of now. When we adjourn at 4:00 o'clock, as of now.

(Testimony of Dick Hallmark.)

Mr. Gillen: I am afraid the effect of the objection would be destroyed then, Your Honor.

The Court: Not when I am saving it.

Mr. Gillen: May I respectfully, for the record, show I think the objection should be presented now. I will, of course, defer to the Court's ruling.

The Court: Yes, Mr. Gillen, you stated that.

Q. (By Mr. Gillen): I think I had just asked you, Marshal Hallmark, about some photographs you stated you were shown by the photographer representing the Southern Pacific Company either four or five days, you stated, after the accident and just before you took that photographer out to the scene of the [57] accident for the purpose of pointing out the scene to him for reasons he wanted to make some photographs there, is that correct?

A. Yes, sir.

Q. I show you here what appears to be eight photographs and ask you if you recognize any of those photographs as being either the photographs or similar to the photographs that you saw.

The Court: You have looked them over in the intermission, haven't you?

The Witness: Yes, sir. There are three here, even though they are enlargements now, at the time they were small, there are three here I recognize as the facsimile of the original photographs.

Q. (By Mr. Gillen): I wonder if you would pull those three you recognize out and hand them to the gentleman.

(Testimony of Dick Hallmark.)

A. That one, that one (indicating). Now, I could have possibly seen these too, which I did not pay them any mind, just those three I paid any particular attention to.

Q. Now, one of these photographs appears to be a motorcar turned completely over; the other over at an angle and the third of a motorcar tilted up, held up by a prop or brace. Those are the three, is that correct? A. Yes, sir.

Mr. Gillen: I wonder if we might have these marked for [58] identification, please.

The Court: Are you going to make them your exhibits, Mr. Gillen?

Mr. Gillen: I am not certain at this time.

The Court: You had better give them your numbers, gentlemen. You are going to use them?

Mr. Thompson: I think we will.

The Court: All right, mark them.

(Plaintiff's Exhibits 1, 2 and 3 marked for identification.)

Q. (By Mr. Gillen): Now, was there any particular thing with relation to the bottom or under part of the motorcar that appears in those photographs you have shown, at least in two of the photographs, that was brought to your attention by anyone or that you observed without the matter being brought to your attention by someone?

A. Well——

Mr. Thompson: I think the answer should be yes or no.

RICHARD R. SINGLETON

called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your full name? [61]

A. Richard R. Singleton.

Q. I wonder if you will try to raise your voice so it may be heard by all the jurors as well as counsel on the other side of the table and the Court. Richard Singleton?

A. Right.

Q. Where do you reside?

A. Willcox, Arizona.

Q. What is your business, please?

A. Right now it is mining.

Q. Mining? A. Yes, sir.

Q. You have been a resident of Willcox for some time?

A. The past six years.

Q. How long have you been a resident of Arizona?

A. About twenty-three years now.

Q. Now, are you acquainted with Marshal Hallmark, the City Marshal of Willcox?

A. Yes, sir.

Q. Known him for some time have you?

A. Well, the time I have been in Willcox.

Q. Directing your attention to August 29, 1946, I will identify that as a day when matters pertaining to an accident came to your attention; I will ask you if you recall accompanying the City Marshal to any place from a street corner in Willcox? [62]

(Testimony of Richard R. Singleton.)

A. Yes, sir.

Q. Under what circumstances did you accompany him?

A. This accident had happened and was reported in and he asked me to go along with him.

Q. You rode out with him in his automobile, did you?

A. Yes, sir.

Q. Did anybody else go out to the scene?

A. Not at that moment.

Q. Did anybody precede you to the scene?

A. Not that I recall. We were the first ones to the accident.

Q. Did anybody who called the accident to your attention or reported it go with you to the scene?

A. No, sir.

Q. Do you remember a man and woman, tourist, calling it to your attention?

A. Yes, sir.

Q. Do you recall whether or not they showed you where the injured man was?

A. I don't recall they went back out with us. They told us about where the man was lying and how to find him.

Q. All right. Arriving at the scene where the man was what did you observe, will you relate to the Jury?

A. Arriving at the scene of the accident we found this man lying just about even with the bar pit on the right-hand side [63] of the road seemingly in a very serious condition.

(Testimony of Richard R. Singleton.)

Q. When you say seemingly in a very serious condition, will you tell us what you saw about him from which you drew that inference?

A. First we noticed his head was in bad shape, seemingly there was blood from front to back.

Q. Blood in front and back.

A. And crossways. As I walked up to him his head was about the first thing I noticed. Then I made a casual examination to see if he had any broken bones, which I observed he possibly had one broken ankle. We didn't dare touch him. I didn't dare put my hands on him until the doctor or ambulance could get there to take him to a doctor. I didn't feel it was my place to administer first aid, anything of that kind, until we had someone there.

Q. Did you notice anybody putting anything under his head?

A. I tried to put some grass to ease the tension on his neck. His head was lying on a lower bank.

Q. After you arrived there what, if anything, was done about summoning further aid?

A. The ambulance was summoned.

Q. Do you know who was sent for the ambulance?

A. No, I don't offhand. The ambulance arrived there shortly.

Q. While you were waiting for the ambulance did Marshal [64] Hallmark remain with you or leave you for any brief period?

A. He left me for a period of time to go over to the tracks to see what happened.

(Testimony of Richard R. Singleton.)

Q. I see. Did the Marshal return?

A. He returned, yes.

Q. The ambulance arrived?

A. The ambulance arrived.

Q. Was the injured man put in the ambulance?

A. The injured man was put in the ambulance.

Q. Do you know who that injured man was?

A. I learned his name later, which was Mr. Schnee.

Q. Do you see him in the courtroom?

A. I believe he is sitting opposite you there in the courtroom.

Q. The young man with the glasses on?

A. Yes, sir.

Q. Had you known him before that time?

A. No, sir, I hadn't.

Q. After the young man was sent away in the ambulance what, if anything, did you do and with whom?

A. Mr. Hallmark and I went back over to the tracks then to find out what it was that happened, to see if everything was in the clear.

Q. What did you observe?

A. We observed this small motorcar off of the tracks and [65] evidently we found——

The Court: I wish Number 6 juror would hold his hand up. Now, that is the man you have to talk to, Mr. Singleton. He isn't hearing a thing you are saying.

The Witness: Thank you, sir. As we approached

(Testimony of Richard R. Singleton.)

the track we found the car sitting off the left-hand side or north side of the track and we examined and found out where Mr. Schnee had been thrown off and hit the opposite track, which would be the south track and then in our observation we found where the car had hit something and jumped the track, followed its course and saw everything was in the clear; then Mr. Hallmark and I went back in to town.

Q. Did you observe any articles lying around or near the scene?

A. We observed some articles, yes, sir.

Q. Will you tell us what those articles were?

A. There were some wrenches and a notebook, apparently a time book, which we, I think, took that over to see they were in the proper place until the proper authorities got out there.

Q. Did you observe anything else near the scene?

A. We observed between the tracks a small piece of iron, a brake shoe, something to that effect, but couldn't observe that had anything to do with throwing the car.

Q. That would be your conclusion. Now, did you observe [66] anything else at or about the scene?

A. We found, upon investigation we found a stick.

Q. What kind of a stick, made out of what kind of material?

A. I believe it was a white pine stake.

The Court: You think it was pine, do you?

(Testimony of Richard R. Singleton.)

A. I believe it was a pine stake, yes, sir.

Q. (By Mr. Gillen): Pine stake?

The Court: Pine timber, white pine.

Q. (By Mr. Gillen): When you say white, you don't mean painted.

The Court: He means that species of white pine, isn't it?

The Witness: Yes, sir.

Q. (By Mr. Gillen): Did you notice anything about that stick?

A. We found the stick had been splintered, oh, for a space of probably a few feet where the stake had apparently hit something. The splinters were laying along back; then we later found where it had hit and the trail of splinters ended at the stake, I believe, that we found.

Q. All right. Keep your voice up, please. You say you and the Marshal then went in to town?

A. Yes, sir.

Q. Do you recall where you went?

A. I believe we went around by the depot or around by the doctor's office to see if everything was taken care of. [67]

Q. Did you return to the scene of the accident?

A. We later returned to the scene of the accident with Mr. Ward, I believe.

Q. Who is Mr. Ward, if you know?

A. As to his capacity there at the time, I don't recall.

Q. By whom was he employed, if you know?

(Testimony of Richard R. Singleton.)

A. The S. P. Railroad.

Q. The Southern Pacific Railroad. Now, did you go out to the motorcar?

A. We went out to the motorcar at the scene of the accident.

Q. Did you observe what, if anything, was done with the white pine—as you distinguished it—grader's stake or surveyor's stake?

The Court: Did you call it a grade stake?

The Witness: I believe it was a grade stake.

The Court: All right.

The Witness: Having been familiar with some of those.

The Court: All right. He wants to know what was done with it.

A. If I remember correctly, the stake was taken back up to the motorcar and laid on the car.

Q. By whom?

A. Either Mr. Hallmark or Mr. Ward at the time, I don't recall.

Q. Then you left the scene of the accident with Mr. Hallmark [68] and Mr. Ward?

A. Yes, sir.

Q. Now, did any representative of the Southern Pacific Railroad interview you at any later time?

A. Yes, sir, I believe they did.

Q. About how long after the accident or after the 29th of August, 1946?

Mr. Thompson: I object to that, if the Court please, on the ground it is incompetent, immaterial and irrelevant.

(Testimony of Richard R. Singleton.)

The Court: He may answer. He asked how long it was.

A. That I don't recall just how long it was afterwards.

Q. (By Mr. Gillen): Can you give us any estimate? Was it a matter of days, weeks or months?

A. I believe it was only a matter of a few days, something like that.

Q. A few days, something like that, is that your answer? A. Yes, sir.

Q. Were you ever shown any photographs of a motorcar by any representative of the Southern Pacific Company?

A. I have seen photographs, yes.

Q. When?

A. I believe only a few days ago.

Q. A few days ago? A. Yes, sir.

Q. By whom were you shown the photographs? [69]

A. I believe Mr. Thompson.

Q. Mr. Thompson, the attorney for the Southern Pacific Company that is sitting here?

A. Yes, sir.

Q. Where was that, please?

A. In Mr. Thompson's office.

Q. Here in Tucson, Arizona? A. Yes, sir.

Mr. Gillen: May I have the photographs that were marked for identification, I wish to pass them to the witness. I wonder if the Clerk might pass those photographs to the witness.

(Testimony of Richard R. Singleton.)

Q. I ask you to look at those photographs, Mr. Singleton, and tell us whether or not those are the photographs or similar to the photographs shown you by Mr. Thompson just a few days ago at his office in Tucson, Arizona.

A. From examination I would say they were.

Q. Was there any part or portion of those photographs that was called to your attention?

Mr. Thompson: I object to that on the ground it is incompetent, irrelevant and immaterial as to what was called to his attention. The photographs will speak for themselves.

The Court: He may answer. Called to his attention by whom?

Mr. Gillen: By anyone. [70]

The Court: Well, it will have to be specific.

Mr. Gillen: Very well, I will withdraw the question. Did Mr. Thompson in exhibiting those photographs to you, if I understand you correctly, did Mr. Thompson indicate you pay particular notice or observe any particular thing in any of those photographs?

Mr. Thompson: I object to that on the ground it is certainly incompetent to prove or disprove any issue in this case.

The Court: He may answer.

A. The mark of where the stick struck the car.

Q. Is that what Mr. Thompson said? I don't think the answer was quite responsive to the question, Your Honor. It was either what Mr. Thomp-

(Testimony of Richard R. Singleton.)

son said or this gentleman's conclusion. I wonder if I might ask the original question be reread to him?

The Court: Start over again.

Q. (By Mr. Gillen): Mr. Singleton, my question is, when you were exhibited or when those photographs were exhibited to you by Mr. Thompson at Mr. Thompson's office did he ask you to note or did he direct you to note any particular part on any of those photographs? Will you just answer that yes or no? A. Yes.

Q. How did he do it, by pointing out something to you?

A. Pointing out the position of where the stake, the splinters were on the car. [71]

Q. Where the splinters were on the car and what part of the car, please? A. Yes, sir.

Q. What part of the car, please?

A. On the under side of the car near the, I would say the brake rod.

Mr. Gillen: I see. I think that is all of this witness. Counsel may cross-examine.

Cross-Examination

By Mr. Thompson:

Q. Mr. Singleton, you mentioned a brake shoe, I believe you said, or something you saw there that day at the scene of the accident. Am I correct in that? A. Yes, sir.

Q. And with reference to where the motorcar

(Testimony of Richard R. Singleton.)

was standing where was that piece of brake shoe?

A. I don't know in footage just about how far, but it was to the east of the car.

Q. And was it inside the rails or outside the rails? A. No, sir, inside the rails.

Q. But to the east of—

A. To the west of the car, I beg your pardon.

Q. To the west of the car and how far west of the car?

A. Well, that in footage I couldn't say.

Q. Approximately how far with reference to the car? Where [72] was it with reference to this stake you told about, or stick?

A. I believe the stake was still to the west, or the piece of iron we found.

Q. Did you observe the piece of iron closely?

A. Yes, sir.

Q. Did it give any evidence of having been moved recently?

A. No evidence it had been moved at all.

Q. Did it have the appearance of having been at the same point for quite some time? A. Yes.

Mr. Gillen: Of course I would have to offer the objection that would be calling for an opinion and conclusion.

The Court: He may answer.

(Last question read.)

The Court: What are you talking about now there?

(Testimony of Richard R. Singleton.)

The Witness: The piece of iron.

Q. (By Mr. Thompson): I believe in your direct testimony you said you found something about where something had struck the ties or ground, did you not?

A. Yes, sir.

Q. What was it you found that indicated that anything had struck the ties or ground, Mr. Singleton?

A. We found a fresh abrasion on the side of the tie.

Q. Now, let me go back. Did you make any observations there to find out whether or not there were any wheel marks on the [73] ties of any character?

A. We did.

Q. What was it you were trying to determine, where the car jumped the track?

A. Yes, sir.

Q. With reference to where you found those wheel marks where did you find that abrasion, as you call it, on the tie?

A. Apparently very near where the wheel marks started on the tie.

Q. And were they west or east of the wheel marks where they started on the ties, if you recall it.

A. Slightly west of it.

Q. Did you at that time look under the motorcar that day while you were out there?

A. I did.

Q. Did you see any evidence of anything striking the motorcar underneath the motorcar at that point?

A. I did.

(Testimony of Richard R. Singleton.)

Q. What did you see that was unusual?

A. I saw that evidently some stake or instrument of some kind had hit the underside of this car. The marks were fresh.

Q. You say you saw that. What did you see? Tell the Jury just what it was you saw there.

A. What I saw on the underside of the car was where something had struck it apparently and had lifted the car, leaving [74] splinters or an abrasion or a scarred place on the underside of the car.

Q. Could you tell what type splinters they were, Mr. Singleton, what type wood was it?

A. I don't think I could from what was on the car there because that seemed to come from the flooring under the car.

Q. I beg your pardon.

A. That seemed to be on the flooring of the car. I didn't lift the car up to examine it thoroughly, I just looked underneath it as it was sitting there beside the track.

Q. And saw where something had struck underneath the car?

A. Saw where it had been struck.

Q. Do you recall at this time where that abrasion was you mentioned on the ties with respect to the two rails, where it appeared?

A. It was slightly to the north side, to the left-hand side of the track looking east.

Q. To the left-hand side of the track going east, is that right? A. Yes, sir.

(Testimony of Richard R. Singleton.)

Q. With respect to the center line between the tracks where would that abrasion have been, Mr. Singleton?

A. It would have been slightly to the left.

Q. To the left of the center?

A. Yes, sir, toward the north. [75]

Q. I don't know that I recall what you said about the condition of this stick or stake, Mr. Singleton. What was its condition?

A. The stake showed evidence of having hit something. One end of it was sheared or nubbed off and splinters were thrown from it for a matter of a few feet there.

Q. What was the condition of the other end?

A. The other end of it, as I recall, was slightly splintered up; not as bad as the other end.

Q. Both ends showed evidence of having struck something?

A. Of having struck something.

Mr. Thompson: I believe that is all, Your Honor.

Mr. Gillen: I think no further questions at this time. I have no further witnesses available on the matter of the liability at this time. I have another witness on that subject, but not available and not reachable at this time, if it please the Court.

The Court: Well, I just can't work jagged hours like this. I will decide later whether I will let you put him on. I want you to proceed now as to liability. This is the plaintiff's case as to liability. If you want to make any motion you can make it at adjournment as of now.

Mr. Gillen: May I be heard by the Court on a motion I mentioned before?

The Court: Oh, yes, at adjournment, as of the time you [76] mentioned it.

Mr. Gillen: I would like the record, of course, Your Honor, speaking about jagged hours, I would like the Jury to know that Your Honor's ruling came as a complete surprise to me. I had my case lined out a certain way.

The Court: I don't want to criticize you or prejudice you at all before the Jury. I am just saying we want to make good out of our time.

Mr. Thompson: Call Mr. Young.

Mr. Gillen: May I respectfully offer the objection to the defendant's case opening before the plaintiff's case is closed on the particular issue involved and before the Court hears an objection and the reasons of the objection to be offered in connection with the procedure Your Honor has ordered.

The Court: The Reporter is taking your objection.

Mr. Gillen: Yes, sir.

ALEXANDER J. YOUNG

called as a witness on behalf of the defendant, being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. Please state your name.

A. Alexander J. Young.

(Testimony of Alexander J. Young.)

Q. Where do you reside? [77]

A. 1392 Waverly Street, Tucson, Arizona.

Q. By whom are you employed?

A. Southern Pacific Company.

Q. How long have you been employed by the Southern Pacific Company?

A. Thirty-three years last May 15th.

Q. What is your present position with the railroad company? A. Signal Maintainer.

Q. How long have you been employed as Signal Maintainer?

A. Since May 15, 1916.

Q. In August and July, 1946, were you stationed at Tucson? A. Yes.

Q. Are you acquainted with the plaintiff, Adolph J. Schnee? A. Yes.

Q. When did you become acquainted with him, Mr. Young?

A. I couldn't say exactly when he started to work for me, but I have no record as to when that was.

Q. When he started to work for the Company he was working with you, is that correct?

A. Yes, he started to work with me.

Q. In what capacity did he start to work?

A. Assistant Signalman.

Q. Did you have any occasion to work with him and give him certain instructions with respect to signal maintenance?

A. Yes, he worked with me. [78]

Q. Did you have any occasion to instruct him

(Testimony of Alexander J. Young.)

with respect to how to build batteries and keep them in repair, signal batteries? Also, did you give him any instructions as to the operation of motor-cars? A. Yes.

Q. How long did he work with you?

A. I don't know, it was several months, but I don't know exactly how long.

Q. Did you give him any instructions with respect to the safety rules of the Company so far as they applied to his job and your job? A. Yes.

Q. And he worked there with you, you say, for some time? A. Yes, some months.

Q. Did he ever in your presence or with you operate one of the motorcars such as used out in your occupation?

A. Along toward the last before he was sent out he did, with me.

Q. You instructed him with respect to that?

Mr. Gillen: Just a moment. I am going to have to offer the objection that counsel's entire examination has been most leading thus far. In fact, he has practically testified.

Q. (By Mr. Thompson): Mr. Young, tell the Jury what you did with respect to the plaintiff in connection with his employment while he was working with you; just tell them as nearly [79] as you can what your duties were with respect to the plaintiff.

A. Well, my work consists of various things like oil signals, building batteries, pulling track support resister wires; there were lots of things. He was

(Testimony of Alexander J. Young.)

with me during all this time and watched me do these things and helped me do these things.

Q. I will ask you whether or not in your work you do operate motorcars. A. Yes.

Q. Tell the Jury what he did with respect to you and him when you were working there during that period with respect to motorcars.

Mr. Gillen: I object to that as having been asked and answered.

The Court: Overruled.

Q. (By Mr. Thompson): Will you tell us, please?

A. When we go out on our work we use the motorcar to travel from one place to the other. I have a district, say, twenty-three or twenty-four miles; we travel from one point to another on the motorcar. He would go with me, I operated the motorcar, but he was with me until a short time before he knew he was going to be sent out; but I am sure I let him operate the motorcar; and when he was along let him handle the controls and handle the motorcar. [80]

Q. Did you have anything to do with instructing the plaintiff so far as safety rules were concerned in operating motorcars?

A. Yes, I did tell him the safe operation of motorcars.

Q. Did you ever give him any safety instructions at what speed motorcars should be operated?

A. Yes; and I always tried to operate the motorcar at a safe speed.

(Testimony of Alexander J. Young.)

Mr. Gillen: I move the latter be stricken.

The Court: It may be stricken. Disregard it.

Q. (By Mr. Thompson): Did you give any instructions to the plaintiff? A. Yes.

Q. What were your instructions to him in regard to permissible speeds?

Mr. Gillen: I wonder if we might fix the time and place.

Q. Do you remember the particular time when you told him that? A. Yes.

Q. Are you sure you did it sometime during the period? A. Yes.

Q. While you and he were together; do you recall anyone else was present? A. No.

Q. What did you tell him with respect to the speed rules [81] governing the speed of those motorcars?

A. The speed is twenty-five miles an hour on straight track and five miles an hour on street and road crossings, but we have to use a little judgment in going on street crossings; where there is lots of traffic you can't even do that.

Mr. Gillen: I ask it all be stricken as not responsive.

The Court: That is all right. It may stand.

Q. Just one more question, Mr. Young. Did you ever give him any instructions with respect to the operating of the motorcar in a back up position?

A. Well——

Q. Just answer yes or no. A. Yes.

(Testimony of Alexander J. Young.)

Q. What did you tell him, if you recall?

A. I told him it wasn't a safe practice to operate the motorcar in reverse position except at short distances, then at reduced speed.

Mr. Thompson: That is all.

Mr. Gillen: I move that be stricken as incompetent, irrelevant and immaterial.

The Court: Denied. Cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Young, how long was Mr. Schnee, the plaintiff, employed with you? [82]

A. I couldn't say. I have no record.

Q. You said a matter of several months?

A. Yes.

Q. Can you tell us what you mean by several months?

A. No, I can't because I can't remember. He was with me several months and I can't remember how many.

Q. Was it four, five or six months?

A. I couldn't say, I don't know.

Q. You said several months. Do you mean by that more than three months.

A. I know he was with me more than two months.

Q. More than two months?

A. More than two months, yes.

Q. You have a distinct recollection, do you, of

(Testimony of Alexander J. Young.)

instructing him in the use and operation of the motorcar, is that correct? A. Yes.

Q. Do you have a distinct recollection of ever having him operate the motorcar when he was with you? A. Yes.

Q. How many times? A. I couldn't say.

Q. Twenty, thirty, forty times?

A. I couldn't say for sure.

Q. Can you give us any idea? A. No. [83]

Q. Just once?

A. No, several times. Several times, I don't know how many.

Q. Do you use the term several in its common meaning of more than three times? A. Yes.

Q. More than three times? A. Yes.

Q. Would you say it was ten times?

A. I couldn't say. I don't know. I don't remember.

Q. Did you operate the motorcar every day for the period of a month or two months that this plaintiff worked with you as an assistant or helper?

A. I did until after I let him operate by himself.

Q. At what point in his association with you in the work did you permit him to operate the car by himself? A. I don't remember that.

Q. Sir? A. I don't remember.

Q. Do you remember how long it was before this accident you permitted him to operate the car?

A. It was probably a week or more.

A. A week or more? A. Yes.

(Testimony of Alexander J. Young.)

Q. Was it a week or more than a week?

A. I couldn't say. [84]

Q. Was it a week?

A. I don't know. It was more than a week, yes.

Q. How much more than a week?

A. I don't know.

Q. Do you have any idea? A. No.

Q. Was it a month? A. No.

Q. Was it less than two weeks?

A. I couldn't tell you. I don't remember.

Q. Who else was working on that maintenance work there? A. With me?

Q. Over that same course.

A. No one else—with me, you mean?

Q. Yes.

A. No one but Mr. Schnee.

Q. Who else was working over that same course maintaining signals?

A. I don't understand what you mean.

Q. What other signal maintainers were there working over that same area?

A. I was assigned to the section; no one else was working there but me.

Q. Did you know a man named Joe that worked as Signal Maintenance Man over that same area? [85]

A. Joe?

Q. Yes. A. No.

Q. Did you know a man named Curry Fields that worked as Maintenance Man over that same area?

(Testimony of Alexander J. Young.)

A. Yes.

Q. Where did he work and when?

A. He was a boy going to the University and he worked with me once in awhile on Saturdays.

Q. At the same time Mr. Schnee was working?

A. I couldn't say about that. I don't know. I don't remember, that is too far back.

Q. You have stated in your direct examination you remember specific things you told Mr. Schnee by way of instruction. Now, do you mean to say you don't remember now whether you had two apprentices working at the same time or not?

A. This other man was no apprentice, he was a Signalman. He was no apprentice.

Q. He was an assistant to you, wasn't he?

A. No, he was working with me, but he wasn't under me. I didn't keep his time. I didn't have anything really to do with him. He was working in my section under me. He was a Signalman.

Q. Were you mistaken when you said a moment ago no one worked your section besides Mr. Schnee? [86]

A. At that time I didn't remember.

Q. At that time you said another man——

A. I don't remember whether he worked with me. He worked under me, but I couldn't say whether he worked under me when Mr. Schnee worked with me.

Q. Isn't it true during the time Mr. Schnee worked with you, whatever length of time it was,

(Testimony of Alexander J. Young.)

you had him doing the exclusive work of cleaning up switches and you never permitted him to operate the motorcar and never gave him any instructions on the operation of the motorcar during the entire time he was with you?

(Question read.)

A. That is not true.

Q. When did you take your vacation in 1946?

A. I don't remember that either.

Q. Sir?

A. I don't remember. I have no recollection.

Q. Did you take it in July?

A. I am not sure.

Q. Did you take it in August?

A. I am not sure.

Q. Isn't it a fact that Mr. Curry Field worked for a period of two weeks in your place while you were on vacation in the year 1946?

A. Mr. Fields relieved me when I was gone, Mr. Curry—[87] Field Curry, I believe it is, relieved me, but he wasn't there when I came back. I don't remember who was.

Q. Is your answer he did take your place when you went on vacation?

A. He took my place, yes.

Q. And you were on vacation for two weeks?

A. Yes.

Mr. Gillen: I think that is all.

Mr. Thompson: That is all.

MARK O. WALLACE

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name. A. Mark O. Wallace.

Q. Where do you reside at present?

A. San Jose, California.

Q. Where were you residing in August, 1946?

A. At Tucson.

Q. Were you employed by the Southern Pacific at that time? A. Yes, sir.

Q. In what capacity?

A. Assistant Signal Supervisor.

Q. Where? [88]

A. Between about seven miles west of Tucson to about three miles west of Lordsburg.

Q. On the Tucson Division?

A. On the Tucson Division, yes, sir.

Q. You are employed by the Southern Pacific at the present time? A. No, sir.

Q. Are you retired? A. Yes, sir.

Q. Are you acquainted with the plaintiff, Mr. Schnee? A. Yes, sir.

Q. Were you acquainted with him in August, 1946? A. Yes, sir.

Q. Did you have an occasion to be in his company at any time during August, 1946?

A. I did.

(Testimony of Mark O. Wallace.)

Q. Just tell the Jury under what circumstances, where you met him and the reasons for your being in his company.

Mr. Gillen: Just a moment. I am going to offer the objection to that as being too general a question; invites self-serving statements and incompet, irrelevant and immaterial matters.

Mr. Thompson: I will withdraw the question and ask another question. Q. What were your duties, if any, with respect to apprentices or students in the Signal Maintenance [89] Department, Mr. Wallace?

A. It was my duty to instruct him in safety rules in the operation of his motorcar and maintenance of signals and minor other duties that he may have to perform.

Q. Where did you see him in the month of August, 1946, speaking now of "him," meaning the plaintiff.

A. Here in Tucson; and I rode on the train with him out to Willcox.

Q. To Willcox, Arizona? A. Yes, sir.

Q. About when?

A. It was in August, 1946.

Q. And were you with him for any considerable length of time at Willcox, in August, 1946?

A. I was with him a part of the day the day we went out there and all of the next day and part of the third day.

Q. And what, if anything, were you and he doing during that period of time?

(Testimony of Mark O. Wallace.)

A. Well, we went out and built——

Mr. Gillen: I don't hear him.

A. ——built some batteries. Then I took him over the district to acquaint him with his territory and I instructed him on the operation of the motorcar and to—well, to be careful in all his duties, so see that he kept out of the way of trains and not run his car too fast, such things as that. [90]

Q. Was there a motorcar there for the use of the Signal Maintenance Man at Willcox?

A. Yes, sir.

Q. Was that car there when you and Mr. Schnee arrived at Willcox?

A. Yes, sir.

Q. Did you have occasion to see that car, that motorcar? A. I did.

Q. Occasion to ride on it or operate it?

A. I did.

Q. What was its condition at that time?

A. It was very good.

Mr. Gillen: Just a moment. We are going to move that answer be stricken. It is an opinion and a conclusion without any foundation being laid whether he made any examination of it or that he was capable of determining its condition.

The Court: Motion denied.

Q. (By Mr. Thompson): Now, with respect to coming back to the time you were in Tucson, Mr. Wallace, and before you and Mr. Schnee went to Willcox, did you have any occasion to instruct Mr.

(Testimony of Mark O. Wallace.)

Schnee with respect to the safety rules of the Company with regard to various matters?

A. Yes, sir.

Q. What matters did you instruct him with respect at that time? [91]

A. We covered approximately all the rules in the Maintenance of Way Book of Rules.

Q. Do you know whether or not he had any instruction on the operation of motorcars?

A. Previous to my——

Q. Going with him to Willcox, do you know?

A. We discussed different things on the way out there; I don't recall just what they were.

Q. Did he operate the motorcar at Willcox at any time while you were there? A. Yes, sir.

Q. Did you operate the motorcar as well?

A. Very little.

Mr. Thompson: That is all.

Cross-Examination

By Mr. Gillen:

Q. Mr. Wallace, you are retired on a pension from the Southern Pacific Railroad Company, is that correct? A. Yes, sir.

Q. You draw a pension now?

A. Draw an annuity. I don't believe they call it a pension.

Q. You draw money as the result of the number of years you were with the Company and the seniority you had attained? A. Yes, sir.

(Testimony of Mark O. Wallace.)

Q. Retirement on a financial emolument of some kind? [92] A. That is right.

Q. You have a son still employed by the Southern Pacific Company, have you not?

A. Yes, I have two.

Q. Two sons employed by the Southern Pacific Company, is that correct? A. Yes, sir.

Q. Where are they employed?

A. San Jose.

Q. In what capacity?

A. One is a Motorcar Repairman and the other is a Signalman.

Q. And they have been with the Company for some years, have they?

A. Approximately fourteen years.

Q. At the time you first met the plaintiff, Mr. Schnee, and took him out to Willcox where was he working? A. Here in Tucson.

Q. Do you remember under what circumstances you transferred him to Willcox or he was transferred to Willcox?

A. Well, the previous Maintainer had been transferred to another position and there had been another man out there previous to Mr. Schnee relieving this man.

Q. Let me ask you if this doesn't refresh your recollection. One morning Mr. Schnee appeared for work at the yard in Tucson, Arizona and that you said to him, "Better go back home and get [93] some blankets and things, the Signal Maintenance

(Testimony of Mark O. Wallace.)

man out at Willeox has gotten drunk and laid off the job and I have to shove a man in there to fill the place." Does that refresh your recollection?

A. This was the relief man relieving the regular Maintenance man.

Q. That is right, isn't that so?

A. That is so.

Q. You had a kind of hurry up job about making a Signal Maintenance man out of him under those circumstances, is that correct? A. Well——

Q. Will you answer yes or no. If you wish to make any explanation I am sure the Court will permit you to. A. Yes.

Mr. Gillen: That is all.

Mr. Thompson: No questions.

The Court: At this time we will take our evening recess until 10:00 o'clock in the morning.

(Whereupon a recess was taken to Thursday, March 2nd, at 10:00 o'clock a.m.)

The following proceedings were had after the recess in the absence of the Jury.

The Court: State your motions gentlemen. Mr. Gillen first. [94]

Mr. Gillen: If it please the Court, I offer the objection to the Court proceeding in the manner that the Court indicated counsel should proceed and upon the ground that the procedure first of all does not here, as indicated for the reasons in Subdivision B, Rule 42 of the Rules of Civil Procedure,

does not either serve to convenience the Court, facilitate the matter or to avoid prejudice. On the other hand, the plaintiff feels that it does prejudice his case and his cause. I particularly wish to direct my objection to proceeding in the manner directed by the Court, to this particular point. If Your Honor will recall in his opening statement Mr. Henderson, one of the defense counsel, indicated to the Jury that reliance upon the affirmative defense set up in the defendant's pleadings to the effect and point that the accident in this case and the injuries resulting therefrom were due exclusively to the negligence of the plaintiff himself and not of the defendant in any part or wise, was based upon a statement allegedly made by the plaintiff within—as my notes indicate, Mr. Henderson—a very few days after the accident where a representative of the Company, according to the statement made, presumably took a statement from the plaintiff in which the plaintiff purportedly gave some facts or made some statement indicating his negligence; and that reliance is being placed upon that.

Now, may it please the Court, we feel that if the defendant in support of its affirmative defense is relying upon [95] a statement and admission against interest, so to speak, made by the plaintiff in this case then most certainly the Court and the Jury, the Court for the purposes of its rulings and the Jury for the purposes of sitting in adjudication of the facts, should have the full benefit of all evidence pertaining to the extent of the injuries and the physical condition of this plaintiff for the

period of time to determine whether or not this statement taken a very few days after the accident, according to the representation made by counsel, was obtained under circumstances and conditions where the plaintiff was in a position to even know whether he was talking to anybody or not. We feel that is part of the liability. We feel it has served no purpose. I say all this, of course, respectfully. It has thrown us completely off balance and off the beam, so to speak. I have in mind Your Honor's intention was to facilitate the matter for the benefit of everybody, both litigants, which is entirely proper. But I believe in so doing Your Honor has put the defendant at a decided disadvantage.

I desire that objection in the record and I feel I should have been afforded an opportunity to make the objection before the case got into a state of partial conclusion of the plaintiff's case and the beginning of the defendant's case. I want the record to note the plaintiff never submitted and rested its case on the particular issue of liability.

The Court: Objection overruled. As to the last point, [96] the one about the statement, I am confident we can take care of that if and when it arises. If you have another witness on liability, if you have him in at 10:00 o'clock I will hear him then.

Mr. Henderson: We would like to make a motion for a directed verdict as of the close of plaintiff's case on the ground the case does not fall within the federal rule that the evidence has to be more than a mere scintilla, has to be more than a

conjectural showing of negligence on the part of the defendant here. The specific motion is based on failure of proof and failure of any proof that will raise any reasonable inference on the part of this plaintiff which is sufficient to go to a Jury on the question of the defendant's negligence.

Mr. Justice Black said in the case decided in January of last year, 1949, which is apparently one of the last Federal Act cases, *Wilson vs. McCarty*, found in the Law Edition advance sheets, 93, at page 403, I believe the Federal Act in spite of the interpretation given it by the United States Supreme Court is still based on negligence; that after all is the only question in this case, everything else has been eliminated. There is still the fundamental proposition there must be negligence found, in the plaintiff's case there is nothing of any weight, as I say, anything that will even fulfill a scintilla and, of course, the Federal Courts do not follow the scintilla rule, except require some substantial evidence [97] on the part of the plaintiff for negligence.

I might present this motion in two parts. Of course, we do have the safety appliance part of the case and under any construction of the case there is no violation of the Safety Appliance Act, therefore I think our motion is well taken for dismissal of that portion of the act. The Safety Appliance Act applies to automatic couplers and grab irons, and so forth and there is no showing that the Interstate Commerce Commission has taken jurisdiction

over the motorcar phase of the defendant's business. So far as the safety appliance part I feel the motion is well taken. I believe, as a matter of fact, in the pre-trial conference it was indicated by Mr. Gillen at some point in the case that attack might well be abandoned.

The Court: I will hear you again at the conclusion of all the testimony on the question of liability.

(Whereupon, the recess was taken until 10:00 o'clock a.m. the following day, March 2nd.)

The Court: You were about to call a witness.

Mr. Thompson: I understand the Court told plaintiff's counsel he might call a witness.

The Court: Yes.

Mr. Gillen: Upon taking inventory of the record I determined the witness I had in mind would perhaps be premature, so I won't call the witness at this time.

Mr. Thompson: We will call Mr. Ward. [98]

ROBERT W. WARD

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name for the record, please.

A. Robert W. Ward.

Q. Where do you presently reside, Mr. Ward?

(Testimnoy of Robert W. Ward.)

A. Yuma, Arizona.

Q. What is your present occupation?

A. Signal Maintainer.

Q. For what Company?

A. Southern Pacific Company.

Q. Where did you reside and by whom were you employed in August, 1946, Mr. Ward?

A. At Willcox, Arizona, employed by the Southern Pacific Company.

Q. Are you acquainted with the plaintiff, Mr. Schnee? A. I am, yes, sir.

Q. Do you recall an occasion when he came out to Willcox as relief Signal Maintainer?

A. I wasn't at Willcox at the time, no, sir.

Q. Were you at Willcox on the 29th of August, 1946? A. Yes, sir.

Q. Did anything of an unusual nature transpire on that day [99] so far as you were concerned?

A. Yes, sir.

Q. Did you recieve word there had been an accident? A. I did, yes, sir.

Q. Who communicated that fact to you?

A. The Southern Pacific Company Station Agent called me on the phone at my home.

Q. Did you know who had been involved in the accident? A. Not at that time, no, sir.

Q. Did you later in the day meet with Mr. Hallmark, an officer at Willcox? A. Yes, sir, I did.

Q. Did you go with him to what you understood to be the scene of the accident? A. Yes, sir.

Q. And where did you go?

A. Well, it was better than a mile and a half, less than two miles east of Willcox.

Q. On the track of the Southern Pacific or within its right-of-way?

A. We drove out in an automobile, yes, sir, and went out to the track through the field.

Q. This was on August 29; about what time of day was it, do you recall?

A. Somewhere between 2 and 3 p.m. [100]

Q. And when you went with Mr. Hallmark what, if anything, did you find along the right-of-way?

A. The wrecked motorcar sitting alongside the track.

Q. Had you ever seen that motorcar before?

A. Oh, yes, sir.

Q. And where had you seen it previously?

A. I had driven that same motorcar for several thousand miles.

Q. And was it the motorcar that was ordinarily used by the Signal Maintainer at Willcox?

A. That was the car assigned to that location, yes, sir.

Q. Was it on or off the tracks proper at the time you saw it? A. It was off of the tracks.

Q. And was it still on its wheels or in an upright position or overturned?

A. It was in an upright position sitting on all four wheels.

Q. About how far from the nearest rail would you say? A. About five feet.

(Testimnoy of Robert W. Ward.)

Q. And with reference to the rails which was it closer to, the north or south rail?

A. To the north rail.

Q. At that point then did you make any sort of investigation to find out what, if anything, had derailed the motorcar? A. I did, yes, sir. [101]

Q. What, if anything, did you find there at that place that was out of the ordinary?

Mr. Gillen: May I interrupt, Your Honor. I have subpoenaed the records through the custodian of the medical records at St. Mary's Hospital and I wonder would there be any objection if this witness could be called out of turn and the records identified?

The Court: All right, step down. Would you have any objection?

Mr. Thompson: No.

PATRICIA MAE JAMES

called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Q. Please state your name.

A. Patricia Mae James.

Q. Where do you live?

A. 2925 East Nineteenth Street.

Q. Tucson, Arizona? A. Tucson, Arizona.

Q. What is your business?

(Testimony of Patricia Mae James.)

A. I am clerk of the record room at St. Mary's Hospital.

Q. In Tucson, is that correct?

A. Tucson. [102]

Q. As such clerk in the record room do you have access to and supervision of medical records and X-rays and data pertaining to patient's cases?

A. Yes, I do.

Q. Are you here this morning in response to a subpoena duces tecum to bring with you all records and data pertaining to the case of one Adolph J. Schnee who was a patient in your hospital in the latter part of 1946 and early part of 1947?

A. Yes.

Q. Did you bring those records with you?

A. Yes, I have them.

Q. Those records you have with you, are they to your knowledge all the records on file in your hospital library pertaining to that case?

A. Yes, they are.

Q. Will you pass them to the Clerk, please?

Mr. Gillen: I am a little bit confused on the procedure we are following; I would like those records to be offered as an exhibit on behalf of the plaintiff, in evidence.

The Court: They may be admitted.

(Plaintiff's Exhibit 4 in evidence.)

Mr. Gillen: Very well, counsel may cross-examine.

Mr. Thompson: No questions.

ROBERT W. WARD

recalled, having been previously sworn, testified as follows: [103]

(The last question was read.)

Mr. Gillen: Objected to as calling for a conclusion.

The Court: He may answer yes or no.

A. Yes, I did.

The Court: Now wait for the next question.

Q. (By Mr. Thompson): What, if anything, did you find at that point?

A. We found what is used by surveyors as a stake, for one thing; also found a U-shaped piece of iron that is used as a brake hanger, but evidently had no connection and was replaced exactly where it was found. It was slightly beyond the point beyond where the car had come to rest.

Q. Where did you find this stick or stake with reference to the motorcar?

A. The motorcar had left the track about sixty-three ties west of where it came to rest and we found the stake about four to six ties east of the point from where the motorcar first left the track.

Q. And this stick or stake, what was the nature of its appearance? Just describe it to the Jury the best you can.

A. It was an ordinary surveyor's stake; one end of it was shattered.

The Court: Do you have that here?

Mr. Thompson: No.

(Testimony of Robert W. Ward.)

The Court: What ever happened to it? [104]

Mr. Thompson: I don't know. It was lost.

The Witness: The pointed end which surveyors use to drive into the ground looked like it had been wedged into something and broken off. The stake also looked as though, gave all indications it had been used for stirring caustic soda solution.

Mr. Gillen: I move that be stricken out, his opinion and conclusion.

The Court: Motion denied.

Q. (By Mr. Thompson): About how long was this stick or stake at the time you saw it, what was left of it?

A. I would say twenty-four to twenty-seven inches.

Q. Did you find any splinters?

A. Yes, we did.

Q. Which direction from where the stake was, with reference to the motorcar?

A. They were—I don't believe I remember exactly where we found them. They were in the center of the track close by this stake. Whether they were slightly east or west I am not in a position to say.

Q. Do you recall whether or not you found any other thing that was of an unusual nature along the track at that point?

A. Unusual nature, no, sir.

Q. Did you pick up any other articles at all other than the stake? [105]

A. I picked up several tools, small tools.

(Testimony of Robert W. Ward.)

Q. What type of tools?

A. Wrenches, pliers.

Q. Where were they with reference to where the car had left the track?

A. All during the sixty-three lengths and some in the track, some on the toe bar and some down off the toe bar, what is known as the barrow pit.

Q. Did you see any evidence along the tracks or ties of the car having left the rails?

A. Yes, sir.

Q. What did you see in that respect?

A. The flange of the wheels of the motorcar left an indentation in the ties.

Q. At about how far from the point where the car came to rest did you first see such marks?

A. Sixty-three tie lengths.

The Court: Which direction was the car pointed?

A. As a railroad we know it as east and west——

Q. Tell me something I can understand. Was its front end pointed back toward Willcox?

A. No, sir, it wasn't. It was pointed more toward Drury, but not directly parallel with the rails.

Q. (By Mr. Thompson): Now, after you found this stick or stake what became of it at that time?

A. It was taken to the Signal Maintainer's tool house at Willcox and put under lock and key with the motorcar.

The Court: This U-shaped piece of iron you were talking about, what is that?

A. A hanger for a brake rigging that is on the

(Testimony of Robert W. Ward.)

freight cars, in the event the brake rigging should become dislocated this hanger holds it in place until the train crew can discover it or make proper repairs or the train gets into the terminal and the car men make the repairs. It had fallen off of some freight car a long time earlier, because it was rusty and had been laying there quite a long time.

The Court: How big a piece of iron is it?

A. About that long or a little bit longer and about that wide (indicating). It is a square or U-shape.

Q. Just where was that?

A. In the center of the tracks.

Q. Where with reference to the motorcar?

A. About three or four ties east of where the motorcar came to rest.

Q. (By Mr. Thompson): Now, after the stake was taken back do you know what became of the motorcar at that time?

A. I don't quite understand.

Q. What became of the motorcar after you left the scene of the accident, do you know?

A. Yes, I took the motorcar back to Willcox and put it under [107] lock and key in the Signal Maintainer's tool house.

Q. And how was it taken back, who took it back?

A. I called the section foreman; he got his motorcar and pushcar and we put the wrecked motorcar onto the pushcar and hauled it into Willcox.

Q. And where was the motorcar placed then?

(Testimony of Robert W. Ward.)

A. Sir?

Q. Where was the motorcar left at that time?
Where did you put the motorcar that day?

A. In the Maintainer's tool house at Willcox.

Q. At Willcox? A. That is right.

Q. Coming back to this U-shaped piece of iron, you say was in the tracks at that point, where was the motorcar with reference to that U-shaped piece of iron? How far would you say it was from that?

A. About three or four ties west of where the piece of iron was laying in the center of the track.

Q. And the motorcar with respect to the center of the track was where?

A. The motorcar was off of the track to the north side of the track about five feet from the first rail.

Q. Could you say whether or not the U-shaped piece of iron showed any evidence of having been struck or moved recently?

A. It showed no evidence and was replaced right where it was [108] picked up from.

Q. You say you replaced it?

A. That is right, yes, sir.

The Court: You mean you put it back where you found it? A. Yes, sir.

Q. You didn't take it in? A. No, sir.

Q. What was its condition with respect to being bright or rusty?

A. Rusty, looked like it had been laying there for probably thirty or forty days.

Mr. Thompson: Now, are you acquainted with

(Testimony of Robert W. Ward.)

Mr. Lyons, who was then the Assistant Division Engineer for the Tucson Division? A. Yes, sir.

Q. Mr. L. E. Lyons? A. Yes, sir.

Q. Are you also acquainted with Mr. A. C. Jacobson? A. Yes, sir.

Q. What was his position about the time of this accident?

A. He was Signal Supervisor, my immediate superior.

Q. I will ask you whether or not you saw them on the day following the accident.

A. I did, yes, sir.

Q. Did you at that time have occasion to go with them to the [109] point where the motorcar was placed in the tool house? A. I did.

Q. And at that time was the stick in question in the tool house? A. It was.

Q. Did you display it to them at that time?

A. At Mr. Jacobson's request I did.

Q. Do you know whether or not any pictures were taken at that time?

A. I didn't see any taken. I don't know.

Q. So far as you know what became of the stake, Mr. Ward?

A. I don't know, Mr. Thompson. I was packing up to leave there and I turned it over to them.

Q. Did you leave Willcox about that time?

A. I left Willcox on September 1st.

Q. Were you on leave at that time from the Company, or were you working?

(Testimony of Robert W. Ward.)

A. Well, I was on leave and was working both, was on what you call vacation with pay.

The Court: How far are ties apart?

A. There are twenty-four to the rail and thirty-nine foot rails.

Q. Tell me how far they are apart.

A. Exactly, I couldn't tell you, but approximately nine inches. [110]

Q. From the nearest edge to the nearest edge?

A. Yes. I think they are fourteen and a half inch centers, I believe that is correct.

Q. (By Mr. Thompson): Mr. Ward, in connection with your work as Signal Maintainer did you have any experience, familiarity with building of the batteries that are used in the signals of the Southern Pacific? A. Yes, sir.

Q. When you speak of building a battery what is done in that connection?

A. You want that in its entirety from the first move?

Q. Yes. Tell how they are rebuilt, what is used.

A. Any plain water, a little muddy water wouldn't hurt, but ordinarily plain water; and the batteries are, of course, purchased from the Edison Battery Company. They consist of an element, the element is of positive and negative plate, the positive plate is carbon dioxide and the negative plate is zinc. They are assembled in a package of eight to the carton; with each element comes a can of

(Testimony of Robert W. Ward.)

caustic soda. At the present time we receive them in cube form; these little cubes are in this can. In the renewing of the battery the old solution is disposed of by throwing it down over the bank and the jar is cleaned out with water; filled almost to the proper level. The solution is made by inserting the caustic soda in the glass jar and stirring it until all the cubes have been dissolved. [111] The jar is placed in position in the house, battery box we call it, the element is placed into its cover and then put into the solution. If the solution has not been up to its proper level we add a little more water to bring it up, stir it slightly with the element and pour in a bottle of oil.

Q. Now, Mr. Ward, what are these containers, are they glass?

A. They are glass jars approximately fourteen inches in all.

Q. Now, you talk about stirring it, what is used ordinarily by the Signal Maintainer in stirring it when making these batteries?

A. A wooden paddle.

Q. Can you say whether or not when that wooden paddle is inserted in that solution for stirring it has any effect on the wood? A. Yes, sir.

Q. What effect does it have?

A. Sort of a burnt effect or cleaning effect.

Q. Is it quite distinctive, the effect of it?

Mr. Gillen: Just a moment. I am going to offer the objection counsel is leading and suggesting.

(Testimony of Robert W. Ward.)

The Court: Sustained.

Q. (By Mr. Thompson): Describe it the best you can, Mr. Ward, just what happens when you stir the stick into the solution, or solution with the stick.

Mr. Gillen: I offer the further objection to this [112] question, may it please the Court, because I think it is too general a question. I think the type of wood involved, the various things I can see might make a difference in the appearance of a stick.

The Court: He may answer.

A. The paddle, ordinarily the Maintainer makes his own paddle with a pocketknife and piece of board. I use a paddle about two or three inches longer than the jar is.

Q. Mr. Ward, you understand the question. The question was what effect does it have to the stick, tell us that.

A. It leaves a burnt effect on the stick.

The Court: How noticeable?

A. The more often it is the more noticeable it is. The first battery you would build it just sort of takes any paint that might be on off, like a stencil or any grease, leaves it kind of a brownish color.

The Court: Had this stick been painted?

A. Not that I would say, no, sir. It had been weathered, I believe.

Q. (By Mr. Thompson): Talking about the stick or stake you found at that point, did it have the same appearance as a stick that had been used for stirring batteries? A. Yes.

(Testimony of Robert W. Ward.)

Mr. Gillen: Just a moment. If the answer is in I would like it stricken. [113]

The Court: Answer it.

A. Yes, sir.

Mr. Thompson: That is all.

Mr. Gillen: Did Your Honor overrule the objection I started to make?

The Court: Yes. I knew what it was going to be. Cross-examine, Mr. Gillen.

Cross-Examination.

By Mr. Gillen:

Q. Mr. Ward, when did you first encounter the stake that you have described here?

A. Immediately after arriving at the scene of the accident we walked westward to the point where the car had left the track; at that time we found the stake.

Q. What time of day was that?

A. I am not in a position to say, Mr. Gillen, exactly, but somewhere between 2 and I got home that evening about 5.

Q. Who was with you at that time?

A. Mr. Hallmark and Mr. Singleton.

Q. Did you discover the stake?

A. I couldn't say exactly whether I did or whether it was one of those men that spoke first.

Q. Does it refresh your recollection that Mr. Hallmark pointed it out to you and told you he had discovered it previously and left it there for some representative of the railroad [114] to see?

(Testimony of Robert W. Ward.)

A. He may have. I don't recall it though.

Q. Do you recall what was done with the stake at that time?

A. The stake was taken to the motorcar.

Q. By whom?

A. I wouldn't say whether it was him, I or who carried it down there, but one of us three.

Q. And was placed on the motorcar?

A. That is right.

Q. Did you leave it there when you left the scene to go back and arrange to have the motorcar hauled in? A. Yes, sir.

Q. Isn't it a fact that you carried the stake in with you in Mr. Hallmark's automobile to the Willcox yard?

A. I don't recall of it, no, sir.

Q. You considered that stake an important factor in connection with the investigation of this accident, did you not? A. Yes, sir.

Q. You thought that was an important piece of evidence, did you not? A. Yes.

Q. And you thought it was such an important piece of evidence you put it under lock and key at some time that same day? [115]

A. That is right.

Q. You called it to the attention of your superiors? A. At his request.

Q. I say you called it to the attention of your superiors yourself?

(Testimony of Robert W. Ward.)

A. No, he requested where is the stick.

Q. How did Mr. Jacobson find out about it?

A. I couldn't tell you.

Q. Did he know about the stake?

A. I assume. He asked where is the stake. I don't recall saying anything to him about the stake.

Q. Did you report to him about having the car back in the yard, having been out to the scene?

A. I did, yes, sir.

Q. Did you also report to him at that time you had a stick under lock and key you thought had something to do with the accident?

A. I don't recall that.

Q. You thought he knew about it and he might like to see it?

A. As I understand, he talked to Mr. Hallmark and Mr. Singleton before he came to me the next day.

Q. Do you have any recollection now as to who picked the stake up from the ground when you first saw it?

A. I can't get that picture in my mind. I couldn't say, no, sir. [116]

Q. The first time you saw the stake did you recognize any discoloration or deterioration on the stake other than the bruised part of the stake?

A. Yes, sir.

Q. Did you make any comment about it to anybody?

A. I don't recall I did.

Q. Did you say to Mr. Hallmark or Mr. Singleton, "That stake has got acid on it?"

(Testimony of Robert W. Ward.)

A. Acid?

Q. Yes. A. No, sir.

Q. Did you observe whether or not the stake had oil on it?

A. I don't recall seeing any oil on the stake.

Q. You do recall seeing the marks, corrosive marks left by acid? A. Not acid, no, sir.

Q. Not acid?

A. No. Caustic soda is not acid.

Q. All right. I probably haven't the technical name. You did immediately perceive the mark left by caustic soda? A. That is right.

Q. And you recognized it as a mark left by caustic soda? A. Yes, sir.

Q. There is no question in your mind the minute you put your eyes on it it had been in caustic soda?

A. That is right.

Q. Tell me was there any caustic soda or any water or caustic mix on or about the derailed car?

A. There wasn't, no, sir.

Q. No elements that went to make up a battery as you have described a battery being built here or replenished? A. None, no, sir.

Q. As I understood your testimony you were able to follow the course of the car from the time it left the track until the point it came to rest?

A. Correct.

Q. Can you tell us a little something about just what you observed with relation to that course the car had taken?

(Testimony of Robert W. Ward.)

A. The point of the first contact, we will say, of the flange of the wheels with the tie was, as I said, about sixty-three ties from the point where the motorcar came to rest and each tie was marked at an angle bearing toward the north.

Q. Pardon, what you mean by that is there was an indication to you the car was veering off rather than running specifically parallel with the rail?

A. That is correct, yes, sir.

Q. When it came to rest it was completely off the track? A. Yes, sir.

Q. Was there any point along the way you observed where any of the wheels of the derailed car were riding down between the [118] two rails straddling one of the rails?

A. No, sir. One of the sets of wheels was on the north side and the other marks were in the center of the track.

Q. That is what I mean; so that the car for a time at least was straddling one of the rails?

A. Oh, yes. I thought you meant both rails.

The Court: The four wheels.

A. They are a four-wheel car, yes, sir.

Q. Were the two south wheels, were they both off the rails?

A. All four wheels were off the rails, but the motorcar was straddling the north rail to the point where it went off the track.

Mr. Gillen: Finally then it left the track bed completely and was alongside the track?

A. That is right.

(Testimony of Robert W. Ward.)

Q. And was headed railroad east?

A. Not directly parallel with the rail, Mr. Gillen.

Q. I understand that. It had been veering off right along? A. That is right.

Q. It was headed railroad east generally?

A. That is right.

The Court: What does one of these cars weigh?

A. Four hundred and ninety-five pounds, I believe, Your Honor.

Q. (By Mr. Gillen): Now, Mr. Ward, I understood you to testify [119] you had used that very car thousands of miles over the road?

A. That is correct.

Q. There are wooden handles that protrude from each end of that car, are there not?

A. That is correct.

Q. Are they double handles like the handles on a stretcher?

A. That is right, only they are set in the car in such a way if you want to lift on the front end of the car you pull the handles out until they reach a stop, which gives you more leverage and if you want to lift on the rear end you pull the handles back until they reach a stop and that gives you more leverage on the back end.

Q. And the purpose of that is so a man can lift one end and drop it down on the track as you have indicated? A. That is right.

Q. And push his handles through and go around and lift the other end? A. That is right.

(Testimony of Robert W. Ward.)

Q. So one man can dismount the car from the rails?
A. That is correct.

Q. Did you work with Mr. Schnee at any time?

A. I did not, no, sir.

Q. Did you give Mr. Schnee any instructions regarding his work?

A. No, sir, not that I recall. [120]

Q. I understand you said you personally use a paddle that you fashion out of some light wood?

A. That is correct.

Q. Such as an orange box wood?

A. That is what I prefer.

Q. Such as the side slats you find on a box of oranges or apples?
A. That is right.

Q. I understood you to say that you whittle one end of it to make a handle?

A. That is correct.

Q. You want a paddle formed so that you get resistance in stirring like a spoon?

A. That is right, but not too wide.

Q. Did you ever use a grade stake to stir a battery solution?

A. No, in my time I don't ever recall using a grade stake.

Q. Did you ever see a grade stake used?

A. No, I didn't.

Q. Now, I understood you to say, Mr. Ward, that it is the practice of Signal Maintenance Men that when they are going to revive or replenish, whatever might be the term, a battery that is in use it

(Testimony of Robert W. Ward.)

is done right at the scene right at the signal, is that correct? A. That is correct.

Q. What solution is left in the battery is thrown right on the ground, is that correct? [121]

A. The old solution.

Q. Yes, the old solution is thrown on the ground?

A. That is right.

Q. Then the jar that contains the solution is washed out? A. That is correct.

Q. Then the water is poured into the jar, caustic powder is put in, stirred up and the plates put in and installed? A. And connected up.

Q. Do you use any oil?

A. Yes, sir, it is a vegetable oil and comes in a small bottle. It keeps the solution and that hermetically seals itself in there so there will be no evaporation and the solution level is maintained during the life of the battery without adding water.

Q. Mr. Ward, anywhere along the line in the vicinity or proximity of signals along the main line there undoubtedly would be patches on the ground where caustic powder or solution had been thrown?

A. There are, yes, sir.

Q. And I suppose anything that came in contact with that ground while the solution was fresh enough would bear some evidence of coming in contact with that solution?

A. That is correct, until it rains. It dries out and leaves a whitish condition on the soil and the rain, if heavy enough, will dissolve that, wash it away. [122]

(Testimony of Robert W. Ward.)

Q. Did you notice any whitish condition on the soil around the scene?

A. No, no place to build batteries there. There is no cause for building a battery near there.

Q. Is there any regulation where a battery must be built? A. Well, you build the batteries——

Q. I am asking you if there is any regulation you know of where a battery must be built in the rule book or anyplace else? A. No.

Q. It had been raining that day?

A. I don't remember, Mr. Gillen.

Q. Don't you remember whether it had been raining? A. I cannot remember, no, sir.

Q. You know, as a matter of fact, a grade stake could not be used to stir a battery solution in a jar?

A. No, I don't know that.

Q. Isn't it a fact that it would be too cumbersome and wouldn't form enough resistance by its size and shape to properly stir as a thin paddle would?

A. It would be wide enough to cause the resistance to stir the battery, but outside of that it would be too cumbersome.

Q. Now, is it my understanding of your testimony that the first time that you saw Mr. Jacobson looking at the stick was when you exhibited it to him and the Divisional Engineer in the shed where you had placed it under lock and key? [123]

A. That is right.

Q. Where was the stick the last time you saw it?

A. The last time I saw the stick was in the tool

(Testimony of Robert W. Ward.)

house at Willcox on the morning of August 30th.

Q. Mr. Jacobson was with you at that time?

A. That is right.

Q. And the Divisional Engineer, Mr. Lyons?

A. That is right.

Q. And after you exhibited the stick to them did you place it again under lock and key?

A. I never touched it again after that, as I recall.

Q. I understood you to say you were leaving on a vacation?

A. No, I had been out of Willcox and I was packing my furniture to leave there permanently.

Q. So you turned the keys over to Mr. Jacobson?

A. Not the keys, no.

Q. Did you retain the keys?

A. It is a signal lock and all Maintainers have a key to fit that particular type lock.

Q. Do you remember meeting Mr. Schnee and a Mr. Maley from my office at Willcox—I beg your pardon, I am wrong. Do you recall meeting Mr. Schnee and his wife and a gentleman from my office by the name of Mr. Maley at or near Yuma, Arizona, the latter part of December, 1948, or New Year's Day or a day or two thereafter, 1949? [124]

A. Yes, sir. That was at Horn, Arizona.

Q. Horn, Arizona? A. Horn.

Q. Is that the first time you had ever met Mr. Maley from my office? A. That is correct.

Q. Do you recall giving a statement to Mr. Maley at that time? A. I do, yes, sir.

(Testimony of Robert W. Ward.)

Q. Do you recall reading the statement?

A. Oh, yes.

Q. Do you recall signing the statement?

A. That is right.

Mr. Gillen: We would like with the Court's permission to pass the statement to the witness or have it passed to the witness and allow you to look at this, if you will, Mr. Ward. I will show it to counsel first. I want you to look at it and tell me if that is your signature.

The Court: The morning recess for ten minutes.

Mr. Scruggs: We have one witness, a doctor, who is examining some records from the hospital. If there is no objection to his sitting right here; otherwise, we would like to withdraw the exhibit.

Mr. Thompson: We have no objection to him using them here or taking them out, whichever is most convenient to counsel. [125]

The Court: He can take them into my chambers.

Mr. Gillen: Counsel has examined the statement. May I pass it to the Clerk?

(Plaintiff's Exhibit 5 marked for identification.)

Mr. Gillen: May the witness see the statement, please?

The Court: I thought he could read that while I was out. You haven't read it yet?

A. No, sir.

The Court: Step down and read it at your

leisure. Do you have another witness you can put on?

Mr. Thompson: Yes. Call Mr. N. A. Wisner.

Mr. Gillen: It is a very short statement. I don't think it will take long for him to read it.

The Court: All right.

NORMAN A. WISNER

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name, please.

A. Norman A. Wisner.

Q. Where do you reside, Mr. Wisner?

A. Tucson, 849 East Sixteenth.

Q. Where were you residing in August, 1946?

A. In Willcox. [126]

Q. What was your position and employment in 1946? A. Section Foreman.

Q. What section? A. Section?

Q. With respect to Willcox.

A. Section 72.

Q. And with respect to Willcox where was your territory?

A. It was from Mile Post 869 to 1080.

Q. Mr. Wisner, did it cover the territory within two or three miles east of Willcox?

A. Yes, sir.

(Testimony of Norman A. Wisner.)

Q. Do you recall any time in the latter part of August, 1946, having an occasion to go out east of Willcox to bring in a motorcar, a Signal Maintenance motorcar? A. Yes, sir.

Q. Do you recall about what time of day it was?

A. It was along in the afternoon.

Q. With respect to the Willcox yard where did you find the car?

A. Approximately two miles east of Willcox, railroad direction.

Q. When you went out to the point where you found this car how did you go out?

A. Went out on my motorcar.

Q. When you got to the point where did you find this motorcar [127] you mentioned, where was it with respect to the rails?

A. It was hanging over the towline on the north side track, railroad direction.

Q. Are you familiar with motorcars?

A. Yes, sir.

Q. Do you recall which direction the motorcar was pointed? I am talking about the engine end of the motorcar. A. Yes, sir.

Q. How was it pointed?

Mr. Gillen: Just a moment. I offer the objection, if the Court please, it is incompetent, irrelevant and immaterial how this man might say it was pointed when he got out there, due to the fact that it hasn't been established this car's position had not been changed by the various people out on the scene prior to his arrival.

(Testimony of Norman A. Wisner.)

The Court: He may answer.

Q. Can you tell?

A. Yes. The motor end of the motorcar was pointed toward Willcox, west.

Q. And what, if anything, did you do with regard to the motorcar then at that time?

A. I just picked the motorcar up, put it on my pushcar and hauled it back to Willcox.

Q. What was done with it at that time?

A. I put it in the Maintainer's tool house. [128]

Q. Left it there? A. Yes, sir.

Q. In whose custody was it?

A. In the custody of Bob Ward, I suppose. He was Regular Maintainer there.

Q. That was where you left the car at that time?

A. That was where I left the car at that time.

The Court: Which end is the engine end, the front?

A. The engine is in the front end of the motorcar, the running direction of the motorcar.

Cross-Examination

By Mr. Gillen:

Q. Who went out with you to the scene?

A. My section gang.

Q. What was his name?

A. I had four men.

Q. I am asking you who went out with you.

A. Do you want their names?

Q. Did you say section hands?

(Testimony of Norman A. Wisner.)

A. I said section gang.

Q. All right. Give me their names.

A. Frank Sanchez, Ramon Avilla, Suzano Luna and Francisco Garcia.

Q. Can you fix the time of day you went out there?

A. Not exactly. It is approximately along around 3 or 4 [129] o'clock.

Q. Didn't you get an order on it?

A. Get an order to go?

Q. Yes.

A. Yes, Bob Ward asked me to go.

Q. Did you get a written order on it?

A. No.

Q. Did you write a written report on it?

A. No, sir.

Q. Anybody else go with you besides your section hands? A. No.

Q. Did Mr. Ward go? A. No.

Q. He didn't go? A. No.

Q. Do you have any information on what time the accident happened? A. No, sir.

Q. Were you informed the accident happened around 1 o'clock in the afternoon?

A. I was informed the accident happened and asked me to go get the motorcar.

Q. You don't know how many people had touched that car or tampered with that car between the time of the accident and the time you arrived there with your section hands? [130]

(Testimony of Norman A. Wisner.)

A. No, sir, I do not.

Q. You don't know whether the car had been moved or not? A. No, sir.

Q. You have a distinct recollection the car was headed with the motor or front railroad west?

A. Yes, sir.

Q. What leaves that so distinct in your mind?

A. I don't understand your question.

Q. What makes that so distinct in your mind?

A. I distinctly remember it, the way the motorcar was laying.

Q. When did anybody first ask you about which way the motorcar was headed?

A. Well, probably after I got back to Willcox.

Q. Do you remember?

A. Not distinctly, I don't.

Q. Do you remember who asked you? Did you ever discuss it with Mr. Ward? A. Yes, sir.

Q. Did Mr. Ward tell you the motorcar was pointed railroad east? A. No.

Q. I will ask you this, are you acquainted with the City Marshal in Willcox, a gentleman by the name of Dick Hallmark?

A. Yes, sir, I am acquainted with him.

Q. You are acquainted with him? [131]

A. Yes, sir.

Q. Did you ever discuss which way the motorcar was headed with Mr. Hallmark?

A. No. We were talking about the accident that evening in Willcox after we got back; as to the condition of the motorcar it wasn't discussed.

(Testimony of Norman A. Wisner.)

Q. Did you ever give a statement to a Southern Pacific Claims Agent by the name of Caldwell?

A. No, sir.

Q. Who did you give your statement to?

A. The only statement I have given was up here in the Lawyer's office.

Q. Is that the first time you ever told anybody the car was headed railroad west?

A. Yes, sir.

Q. That is the first time you ever did?

A. Yes, sir.

Q. Who suggested that to you?

A. Well, the lawyers.

Q. The lawyers suggested it to you and Mr. Goins, the Claim Agent, suggested it to you?

A. Claim Agent, no.

Q. You know Mr. Goins, the Claim Agent?

A. Sure.

Q. Did he ever talk it over with you? [132]

A. I didn't understand the name.

Q. Did you ever talk it over with him?

A. No, only just slightly was all.

Q. Slightly. During the slight conversation you had with him did he tell you the car was pointed railroad west?

A. No, sir, he didn't.

Q. Was it within your knowledge that City Marshal Hallmark tore up a statement because the Claims Agent had it that the car was pointed west—

Mr. Thompson: I object to that.

(Testimony of Norman A. Wisner.)

Mr. Gillen: May I finish the question?

Mr. Thompson: On the ground it is improper.

The Witness: No, sir, I never.

The Court: He says no.

Mr. Gillen: We are all clairvoyant around here, if the Court please.

The Court: I am pretty good at it.

Mr. Gillen: That wasn't intended as a reflection on the Court.

Mr. Thompson: If the Court please, may I have that stricken on the grounds it is assuming something not in evidence.

The Court: Ask it over again then I will rule.

Q. (By Mr. Gillen): Mr. Wisner, is it within your knowledge, having discussed this accident as you stated with City Marshal [133] Hallmark, City Marshal Hallmark tore up a statement that was being written out by Claims Agent Caldwell because Claims Agent Caldwell insisted in putting into the statement the car was headed railroad west when Mr. Hallmark insisted the car was headed railroad east?

Mr. Thompson: I make the objection and ask it be stricken on the grounds it assumes facts not in evidence and ask the Court to instruct the Jury to disregard the inference.

The Court: Objection overruled. Answer the question.

A. I know nothing about it.

Q. You know nothing about that?

(Testimony of Norman A. Wisner.)

A. I know nothing about the statement.

Q. Is it your testimony now that nobody from the investigative force of the Southern Pacific Railroad ever discussed with you the position of the car or your knowledge of the accident until just recently at the lawyer's office? A. No, sir.

Q. What is it?

A. No, sir, I never discussed it with him.

Q. You were called upon to make that 26-11 in connection with the accident?

A. No, sir, that is out of my department. My department is the Track Department.

Q. Anybody can be called upon to fill out form 26-11? A. Yes, but I was never called upon.

Q. As a Section Foreman you look after the roadbed within a certain area, within your area, is that correct? A. Yes, sir.

Q. What is your duty with regard to keeping the right-of-way, roadbed, clear of obstacles that might cause accidents?

A. Well, we are required to patrol the track, see it is safe for passage of trains at all times and there are no hazards.

Q. If you find part of a brake shoe or part of a steel hanger on the track what is your duty with reference to that, on the bed or right-of-way.

A. Pick it up, take it up and throw it in the scrap pile.

Q. Keep the right-of-way clear, in other words?

A. Yes.

(Testimony of Norman A. Wisner.)

Q. Not only the rails but the portion of the roadbed between the rails? A. Yes, sir.

Q. When had you last patrolled the area between Willcox and two miles east, railroad east of Willcox, to determine if there were any obstacles, objects such as scrap iron, grade stakes or anything of that nature that you would be duty-bound to clear off the right-of-way?

A. The day before that, August 26.

Q. The day before that. Did you do it yourself?

A. My section gang. [135]

Q. Your section gang did it, you say, the day before that, August 26th? Did you say August 26th?

A. I said August 25th.

Q. What did you mean the day before that?

A. I meant I had been over my track August 25th previous to this accident.

Q. Four days before the accident?

A. August 25th.

Q. Yes, sir, four days before the accident. The accident was August 29th.

A. I meant to say the 28th.

Q. What switches it in your mind from August 25th to the 28th, just the fact that an accident happened?

A. Yes. I was thinking about August 26th as the accident.

Q. That is why you said the 25th?

A. That is why I said the 25th.

Q. Did it come to your attention that on the

(Testimony of Norman A. Wisner.)

day of the accident there was noted between the rails in a close proximity to where the accident occurred a piece of metal, U-shaped metal that was rusty and appeared to have lain there for thirty or forty days, found between the rails, did that come to your attention? A. I know nothing of it.

Q. Did it come to your attention when it was found by Maintenance men it was left just where it was found, did that [136] come to your attention?

A. Nothing like that.

Q. When did you next inspect the right-of-way after the accident?

A. Well, I went out that evening and inspected it up to the point of the accident.

Q. Did you find the piece of U-shaped metal there that apparently was part of a brake hanger?

A. No, sir.

Q. Did you ever find that piece of metal there?

A. No, sir.

Q. You never did. Do you ever find grade stakes along the right-of-way?

A. At times we do, yes, sir.

Q. It is a fact, is it not, the railroad surveyors are continuously surveying the right-of-way, isn't that so? A. Yes, sir.

Q. The purpose of that, isn't it, to determine the roadbed is setting at proper angles and hasn't deteriorated or tilted?

A. They are put there for new surface to surface it to the stakes and the center line stakes.

(Testimony of Norman A. Wisner.)

Q. And you frequently find surveyor's stakes sticking in the line and laying on the ground along the right-of-way?

A. We see them once in awhile, not too frequently, because we usually keep them cleaned up.

Q. You usually keep them cleaned up?

A. Yes, whenever we see them.

Q. There are times, are there not, when you are engaged in work which prevents you from making inspections of your right-of-way? A. Sure.

Q. Sometimes a week or two at a time?

A. Never over three days with me.

Q. Never over three days; so it might be three days when the right-of-way would be cluttered up and you wouldn't get around to clearing it off, is that it? A. Yes, sir.

Q. Did you ever have a discussion with anyone other than the lawyers and Mr. Goins just before this trial as to which way the car you took into Willcox, the motorcar that was derailed that you took into Willcox, was headed? A. No.

Q. Is it your testimony, sir, that having hauled in this motorcar on the late afternoon of August 29th, 1946, that without ever referring to its direction, the way it was headed again until just at the time of this trial in 1950 that you remember distinctly the car was headed railroad west?

A. I remember distinctly it was headed railroad west.

Q. How many other motorcars have you hauled in since August 29, 1946? [138]

(Testimony of Norman A. Wisner.)

A. Pardon, I did not understand that.

Q. How many other motorcars have you hauled into the yard? A. None.

Q. How many other kinds of cars have you hauled into the yard since 1946, August?

A. None.

Q. You have never had any participation in any derailment accident since 1946?

A. Pardon me there just a minute, when a train hit a car up at Rodeo I hauled it in.

Q. When was that?

A. That was about, as near as I remember, a year after this. But there were no personal injuries in it.

Q. Did it hit a motorcar?

A. A train hit it, yes, sir.

Q. A train hit a motorcar; can you give us the date of that?

A. No, sir, I cannot. It was in the wintertime; just what date I don't remember.

Q. Now, you remember distinctly, do you not, you examined the right-of-way for obstacles on August 28, 1946; can't you give us the date a year later when you hauled away a motorcar that had been struck by a train?

A. No, sir, I can't. It was in the wintertime. I wasn't called upon to make a report, anything like that.

Q. You were not called upon to make a report on this one? [139] A. No.

(Testimony of Norman A. Wisner.)

Q. Can you tell us which way that motorcar was headed?

A. It was torn up, you couldn't tell which way it was headed.

Q. Can you tell us whether it was lying on its side, right side up, upside down?

A. Scattered over an area about fifty or sixty feet.

Q. You just picked up the pieces?

A. Picked up the pieces is all there was.

Q. Mr. Wisner, when you went out to haul in this motorcar did you make any observations around the scene there? A. Which one do you mean?

Q. The motorcar involved in this case, the one on August 29, 1946, the day after you had inspected the right-of-way.

A. No, I didn't, just looked at the condition of my track.

Q. I didn't understand that.

A. I looked at the condition of my track.

Q. What did you observe about the track?

A. It was in perfect condition. I got my gage on it and there was nothing wrong with the gage or surface.

Q. Did you note anything about the ties?

A. No, the ties were o.k.

Q. Did you note anything about them?

A. I noticed one little mark on the tie just before the motorcar went off.

Q. Just one little mark? [140]

(Testimony of Norman A. Wisner.)

A. Of one tie.

Q. Is that the only scarring you saw on any ties?

A. I think that is all I saw.

Mr. Gillen: That is all.

Mr. Thompson: That is all.

The Court: Where are these grade stakes when you find them, between the tracks?

A. Find them between the tracks and laying along the toobar.

Q. When you find them upright?

A. A center stake is put in the center of the track.

Q. How long are those?

A. About two feet, eighteen inches.

Q. How far above the surface?

A. Just put up about three inches, two and a half or three inches above the tie.

Q. Where does that leave them with reference to the rail? A. About three inches below it.

The Court: That is all from me.

ROBERT W. WARD

recalled, having been previously sworn, testified as follows:

Cross-Examination

By Mr. Gillen:

Q. Did you examine the statement, Mr. Ward?

A. I did, yes, sir. [141]

Q. Is that your signature?

A. That is my signature.

(Testimony of Robert W. Ward.)

Q. Do you recall having read that statement?

A. Yes, I did.

Mr. Gillen: I wonder if I might have the statement.

(Document handed to counsel.)

Q. Mr. Ward, did you ever hear a discussion had anywhere that the railroad company was going to contend that Mr. Schnee was carrying a grade stake in his car to stir up battery solution?

A. I don't recall of ever hearing one, Mr. Gillen.

Q. Isn't it a fact that when this statement was taken from you that Mr. Schnee and Mr. Maley told you that they were informed from talking to persons who had been contacted by the Claims people a year earlier that that was going to be the contention of the railroad? A. I wouldn't deny——

Mr. Thompson: Just a moment. I object to that on the ground that is improper cross-examination.

The Court: He may answer.

A. I wouldn't deny that, but I still don't recall.

Q. Isn't it a fact that that is why you made the statement with reference to the impossibility or impracticability of attempting to use a grade stake for stirring this battery solution? [142]

Mr. Thompson: There is no showing he ever made such a statement, if it please the Court.

The Court: He may answer.

Mr. Thompson: The statement would be the best evidence.

(Question read.)

(Testimony of Robert W. Ward.)

A. To answer that yes or no, I would say no.

Q. Do you have any explanation you would care to make?

A. I made the statement to Mr. Maley and Mr. Schnee at the time that they had contacted me with this reservation: "Anything I can do to help you out I will be glad to, insofar as I can remember I will tell you exactly what took place."

Q. I don't think that is responsive to the question. Well, let it stand. Do you recall why you referred in your statement to the fact that a grade stake would be most impractical to attempt to use to stir a battery solution?

Mr. Thompson: If it please the Court I object to counsel purporting to ask him something from a statement that doesn't appear on the statement.

Mr. Gillen: Counsel has read the statement himself; you will find it appears on the statement.

The Court: Hand me the statement.

Mr. Gillen: I would like permission to read the entire statement to the Jury.

The Court: Good. Put it in evidence first.

(Plaintiff's Exhibit 5 in evidence.) [143]

Mr. Gillen: I take it Your Honor has made a ruling on the objection that was offered?

The Court: We have admitted the statement and you are going to read it.

Mr. Gillen: Yes.

"Statement of Robert W. Ward—Signal Foreman—70 Signal Department—" Is that 70?

(Testimony of Robert W. Ward.)

The Witness: S. P. Company, Signal Department, Signal Gang, yes, sir.

Q. There appears to be something that looks like 70—I see, “c/o Signal Department, Tucson, Arizona.”

“I was signal maintainer at Willcox, Ariz., on August 29, 1946, when Adolph Schnee was injured east of Willcox when the motor car on which he was riding was derailed. I was called by the station agent to identify Mr. Schnee at the doctor’s office which I did and then went out to the scene of the accident. I was present at the time Mr. Albert C. Jacobson picked up the surveyors stake which was apparently the cause of this accident. This stake was about $11\frac{1}{4} \times 11\frac{1}{4}$ and about 30 inches long. I have been a signal maintainer for about 22 years and I have never used a stake of this kind to mix batteries. It would be too large and cumbersome to use, as we use a thin paddle to mix battery solution. After we picked up the tools we placed the car on a push car and took it into the Willcox station. Mr. Norman Wisner, section foreman, [144] Ramon Abilla, section laborer, myself and other laborers picked this car up. We also found a piece of brake shoe laying near the scene of derailment, which had apparently been laying there for some time. Mr. Albert Jacobson signal supervisor, Mr. Lyons Asst. Div. Engr. at that time and another man I believe was Bob Glasser out of the div. engrs. office were with me at the time the stake referred to above was found

(Testimony of Robert W. Ward.)

and this was the day after the accident at about noon. Robert W. Ward, Signal Foreman, Signal Gang 9, Tucson Division."

Mr. Gillen: Now, Mr. Ward, can you tell us what it was that brought up the topic in your statement, if you remember, with regard to the impracticability if not the impossibility of using a grade stake to mix battery solution?

A. I never used one. They are too large and too cumbersome.

Q. What I am asking you, do you recall what brought that subject up that caused you to refer to it in your statement?

A. I don't recall, no, sir.

Q. Do you recall it was brought to your attention and you had already had information on the fact that it was being contended Mr. Schnee was carrying that stick with him to mix battery solution?

A. As I told you, I don't recall but I don't deny it was called to my attention.

Q. Now, isn't it a fact that you never mentioned to Mr. Schnee or to Mr. Maley that the grade stake you saw out at the [145] scene had any evidence that it had been used in a battery solution?

A. I didn't mention that as I recall, no, sir.

Q. Was there any reason why you didn't mention it to them if you recalled at that time?

A. None whatsoever.

Q. Do you think your memory was better about matters at that time or better now?

(Testimony of Robert W. Ward.)

A. I don't know that it is any different.

Q. You recollect you testified this morning that you went out to the scene first with Mr. Hallmark and you don't know whether you discovered the stake or whether Mr. Hallmark pointed it out to you?

A. That is right.

Q. You noted, did you not, in this statement you said you were with Mr. Jacobson and certain other members of the Southern Pacific Maintenance force and that you were present when Mr. Jacobson pulled up the stake that caused the accident and that was about noon the day after the accident; were you mistaken about that?

A. Could I answer that what I finally told Mr. Schnee?

Q. No, sir, I am asking you to answer the question I put to you, if you please.

A. I don't believe, Mr. Gillen, the statement was Mr. Jacobson pulled the stake up. [146]

Q. Let's read the statement and if you wish I will ask permission of the Court to have it placed back in you hands: "...I was present at the time Mr. Alfred C. Jacobson picked up the surveyors stake...." If I said "pulled" I mislead you. I apologize. Picked up the stake which was apparently the cause of this accident. And at the conclusion of the page you told who was present and said this was noon the day after the accident. Do you wish to see the statement?

A. That statement is in error.

(Testimony of Robert W. Ward.)

Q. That statement is in error?

A. That part of it, yes, sir.

Q. You say it was as you testified this morning, Mr. Jacobson didn't see the stake until you took it out from under lock and key and showed it to him and Mr. Lyons?

A. That is correct.

Q. You can't tell us why you didn't mention, when you made reference to the stake, why you didn't mention in your statement it had corrosive matter on it or the appearance of having been in a corrosive solution?

A. Well, it is better than two years later. It didn't appear to amount to anything. I never even let it enter my mind that it could be of some importance.

Q. But you admit there might have been a discussion to the effect that they were attempting to say Mr. Schnee had that stick and had used it in a solution? [147]

A. That is so.

Q. You stated in your statement that would be most cumbersome and wouldn't be practical to you, is that right?

A. That is right.

Q. Do you say that you were also present when the car was loaded on the flatcar?

A. Yes, sir.

Q. And you were present and heard Mr. Wisner testify, did you not?

A. No, I wasn't. I was out in the hall.

Q. If Mr. Wisner said you were not present when he moved the flatcar with his section hands you would say he was mistaken?

(Testimony of Robert W. Ward.)

A. I would say he was mistaken.

Q. You have a distinct recollection of assisting in the loading of that motorcar onto the flatcar to be hauled into Willcox? A. Yes, sir.

Q. And that was, was it not, Mr. Ward, right after you had left Mr. Hallmark and Mr. Singleton?

A. That is correct.

Q. And that was right after you had first had called to your attention the stake?

A. Not immediately, right after we had returned to Willcox in the automobile.

Q. I understand that, but it was right after the trip where [148] you had gone out there with Mr. Hallmark and Mr. Singleton and for the first time saw the stake? A. Yes, sir.

The Court: Why don't you put on this pad, I would like for you to do it for me, put the rails there and put the car there the way you saw it in relation to the rails.

Mr. Gillen: I have concluded my cross-examination, your Honor, with the exception of whatever your Honor wishes.

The Court: Mark the car front end or rear end, however you do that.

A. All right, sir.

The Court: Pass the sketch down to the lawyers.

(Sketch handed to counsel for plaintiff.)

The Court: When you get through with it take it over to Mr. Thompson.

(Sketch handed to counsel for the defendant.)

(Testimony of Robert W. Ward.)

The Court: Do you want to ask any questions about that or make any use of that?

Mr. Gillen: May I see it once more, please.

The Court: I am not going to force it on you gentlemen.

Mr. Gillen: I think it would be very useful, your Honor.

Q. Mr. Ward, when you drew the diagram for His Honor and indicated east on the diagram you were indicating railroad east, is that correct?

A. Correct. [149]

Q. Looking toward Willcox?

A. No, that is west from the scene of the accident.

Q. That is right, looking away from Willcox is what I meant to say. A. That is right.

Q. And that is the way the front of the car was pointed? A. Yes, sir.

Q. Railroad east away from Willcox?

A. That is correct.

Mr. Gillen: I should like with the Court's permission to have the diagram Your Honor had drawn marked as an exhibit for the plaintiff.

The Court: Very well. Pass it around to the Jury after it is marked.

(Plaintiff's Exhibit 6 in evidence.)

Redirect Examination

By Mr. Thompson:

Q. Do you recall when Mr. Maley took this statement from you, Mr. Ward?

(Testimony of Robert W. Ward.)

A. You mean the exact date?

Q. Yes.

A. It was a Sunday afternoon and I believe it was at least two weeks in January of 1948.

Q. It was January, 1948?

A. I think so. [150]

Q. Did you have occasion to make any written report of this accident immediately following the time of the accident, Mr. Ward?

A. Yes, I did.

Q. And was that statement made within a matter of a few weeks or a few days from the time of the accident?

A. I don't recall the exact time, but it was shortly after the accident.

Q. Was the statement then made you made for the benefit of the Company? A. Yes, sir.

Q. And you told in that statement what you then recalled had happened, is that correct?

Mr. Gillen: Just a moment. I object to leading and suggestive questions and also the statement would be the best evidence.

Mr. Thompson: If it please the Court, I think this is a very proper question to ask him.

The Court: You are going to put the statement in, aren't you?

Mr. Thompson: Yes.

The Court: Let us get it marked.

(Defendant's Exhibit A marked for identification.)

The Court: Now, Mr. Gillen will have to have a chance to look that over in fairness, so if you have another witness to [151] put on for the next fifteen minutes Mr. Gillen can look that over during the recess.

DAVID WISNER, JR.

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

The Court: How many witnesses do you have on liability?

Mr. Thompson: I want to cross-examine the plaintiff and we have two witnesses there at the scene of the accident.

Q. (By Mr. Thompson): State your name.

A. David E. Wisner.

Q. Where do you reside, Mr. Wisner?

A. Bowie, Arizona.

Q. And what is your position with the S. P. Company? A. Roadmaster.

Q. How long have you been so employed?

A. About eight years.

Q. And were you so employed on August 29, 1946? A. Yes.

Q. Do you recall having been in Willcox on the date of August 29, 1946? A. Yes.

Q. What fixes that date in your recollection?

A. Well, I made a motorcar trip with Mr. Lyons

(Testimony of David Wisner, Jr.)

who was then [152] Assistant Division Engineer on the Tucson Division. We went from Bowie to Cochise.

Q. Just a moment, was that trip that fixed it——

A. No, reviewing a statement I made to the Superintendent shortly after this accident happened.

Q. Did you know the plaintiff, Mr. Schnee?

A. I had seen him a few times.

Q. Did you hear of an accident he had out there?

A. The following day.

Q. The following day? A. Yes.

Q. And it was, now, coming back to August 29th then what did you do that day? Just tell the Jury briefly and who was with you?

Mr. Gillen: Just a moment. If he didn't hear about the accident until the following day I object to the question as incompetent, irrelevant and immaterial and having no bearing on the issue.

Mr. Thompson: The purpose is to show he passed over and back over this same track.

Mr. Gillen: This would be incompetent, irrelevant and immaterial. So did Schnee.

The Court: He may answer.

A. Mr. Lyons and myself left Bowie between 7 and 8 o'clock in the morning, made a motorcar trip to Cochise. Mr. Lyons [153] left me there and continued on west. I returned to Willcox that day and ate lunch and between 12:30 and 1 o'clock I put my motorcar on and started back to Bowie, continued back to Bowie.

(Testimony of David Wisner, Jr.)

Q. As the Roadmaster is it your duty to inspect the roadway? A. Yes, sir.

Q. Is that part of your duty? A. Yes.

The Court: Is that what you were doing?

A. Yes.

Q. (By Mr. Thompson): Are you familiar with the first signal containing the block signal west of Willcox, were you familiar with that?

The Court: West?

Mr. Thompon: I mean east of Willcox.

A. Approximately.

Q. Did you have occasion to pass over all the track between Willcox, the mainline between Willcox and Bowie, is that correct, that day?

A. Yes.

Q. First going and then returning to Bowie?

A. Yes.

Q. You made the last trip, you say, sometime after lunch? A. Yes.

Q. Now, where is Cochise and where is Bowie with reference [154] to Willcox?

A. Cochise is west from Willcox approximately nine or ten miles and Bowie is twenty-four miles east of Willcox.

Q. Are they both on the main line of the Southern Pacific? A. Yes.

Q. Did your motorcar experience any difficulty at any point along the line that day particularly as you passed east from Willcox? A. No.

Mr. Gillen: I offer the objection it is leading and

(Testimony of David Wisner, Jr.)

suggestive, cross-examining his own witness and it is incompetent, irrelevant and immaterial whether or not he encountered any difficulty.

The Court: Answer.

A. No.

Q. Did you see or observe any obstruction on the rails as you passed from Willcox east that day going towards Bowie in the afternoon?

A. No.

The Court: Was there anything between the rails?

A. No.

Q. (By Mr. Thompson): Did you see Mr. Schnee at any time that day, Mr. Wisner?

A. After I placed my motorcar on the track I heard a train coming from the east some four or five miles from Willcox. The [155] motorcar and myself went to the east switch, set our car over and back into the siding.

Q. Where was that in Willcox?

A. East switch at Willcox.

Mr. Gillen: May we have the time of day?

A. Between 12 and 1 o'clock, 12:30 and 1. I observed the Signal Maintainer bring his motorcar from the tool house, place it on the mainline headed west; about that time the block signals went up and he run his motorcar to the west switch, set it over on the side and backed up to the tool house and that is the last I observed.

Mr. Gillen: I move that be stricken as incompetent, irrelevant and immaterial.

(Testimony of David Wisner, Jr.)

The Court: It is stricken, disregard it.

Mr. Gillen: May I respectfully request that the Jury be admonished to disregard it?

The Court: I did.

Mr. Henderson: The position of Mr. Schnee shortly before he made this trip headed west I think is extremely important.

The Court: Isn't this the day before?

Mr. Henderson: No, the same afternoon, Your Honor, between 12:30 and 1 o'clock.

Mr. Gillen: This is the lunch hour in the yard, an hour before this man started out.

The Court: I thought he went over the line the day before. [156]

Mr. Thompson: No, Your Honor, the same day before the accident.

The Court: Witness, when did you make the inspection of the track—oh, yes, you heard about the accident the next day, didn't you?

The Witness: Yes.

The Court: You are talking about the day after the accident?

The Witness: Yes.

Q. You made this inspection east of Willcox the day after the accident?

The Witness: The day of the accident.

The Court: What time did you leave Willcox?

A. Between 12:30 and 1 o'clock. I arrived back to Willcox from Cochise, went and ate lunch and proceeded to Bowie.

(Testimony of David Wisner, Jr.)

The Court: I had my days wrong. Now, ask your question again.

Q. (By Mr. Thompson): I asked you if you saw Mr. Schnee at any time the day of August 29, 1946.

Mr. Gillen: To which I offer the objection it is incompetent, irrelevant and immaterial unless he saw him by the scene.

The Court: Overruled. Answer yes or no.

A. Yes.

Q. And where did you see him and what was he doing? [157]

A. He took his motorcar up to the main line headed west and when this train entered the block he run it up to the west switch, run it over and backed it up to his tool house.

Mr. Thompson: That is all.

Mr. Gillen: Now, I renew my objection and move the answer be stricken. This was during the noon hour between 12 and 12:30.

Mr. Thompson: 12:30 and 1.

Mr. Gillen: I beg your pardon. This man said he resumed his trip on between 12:30 and 1 and pulled his car up to get—

The Court: Complete your objection, then I will rule.

Mr. Gillen: I move it be stricken as incompetent, irrelevant and immaterial, if it please the Court. What he saw Mr. Schnee doing in the yard at Willcox during the noon hour, particularly with

(Testimony of David Wisner, Jr.)

reference to backing his motorcar up into the work shed would have absolutely no *bearing how* he placed his motorcar or what happened to his motorcar a half hour or better than a half hour after this man admits he left the yard. This gentleman says he left the yard between 12:30 and 1 to continue his journey. Mr. Schnee testified his lunch hour was 12 to 1 and it was some several minutes after it he started out, went out to this signal and found he didn't have the material, came back to Willecox and got his material and went out to the signal again and the accident. It is entirely [158] too remote. I ask it be stricken and the Jury admonished to disregard it.

The Court: Motion denied. It may stand.

Cross-Examination

By Mr. Gillen:

Q. You were making an inspection of the road-bed, were you. A. Yes, sir.

Q. Did you see anything along the roadbed that formed an obstacle that you as Roadmaster would want removed? A. No, sir.

Q. Did you pass the scene that you later learned was the scene of the accident?

A. At what time?

Q. Any time. A. That day, yes.

Q. What time?

A. Sometime during the morning I went west over it and sometime between 12:30 and 1 o'clock I went east back over it.

(Testimony of David Wisner, Jr.)

Q. When you went east back over it between 12:30 and 1 o'clock did you observe any obstacle in the roadbed? A. No, sir.

Q. Any foreign object in the roadbed?

A. No, sir.

Q. Did you observe a brake shoe or U-shaped piece of metal appearing to be a brake hanger?

A. No, sir.

Q. Did you observe a grade stake?

A. No, sir.

Q. You see lots of grade stakes along the right-of-way?

A. As a rule they are placed for grade raising purpose.

Q. You see lots of them along the right-of-way, don't you? A. Not lots of them.

Q. You see many of them?

A. I see some, yes.

Q. You know the survey parties for the Southern Pacific are constantly at work and constantly putting up their grade stakes? A. Yes.

Q. That goes on day in and day out?

A. Yes.

Q. In the course of being a Roadmaster you have seen lots of grade stakes sticking up and lying down between the rails and alongside, parallel?

A. I have seen them sticking up. I have never seen them between the rails.

Q. Your father testified he had seen many lying between the rails. You have never seen them?

(Testimony of David Wisner, Jr.)

A. No, sir.

Q. When you see a piece of metal between the rails such as a brake shoe or any object of that kind, what within the course [160] of the safety rules and your particular duties do you do about it?

A. I observe it; if enough to do any damage to anything I stop and remove it from the track.

Q. You stop and remove it from the track?

A. Yes.

Q. You are the one that determines whether or not it is dangerous?

A. If I observe it, yes.

Q. I say, you are the one when you observe something, you are the one that determines whether it is dangerous? A. Yes.

Q. If you don't think it is dangerous you don't remove it? A. Yes.

Q. So if you see a big U-shaped piece of metal off a brake hanger, would you leave that laying if you found it lying between the ties?

A. If it is down below the ties, possibly, yes.

Q. Isn't it the duty of the section gangs to keep the right of way completely clear of any foreign object?

A. They are supposed to keep the scrap cleaned off, yes.

Q. If you see objects along the right-of-way, do you call it to the attention of your section crews?

A. Yes.

Q. Do you ever hold any investigation or take

(Testimony of David Wisner, Jr.)

any disciplinary [161] measures against section crews for not keeping right-of-ways clear?

A. I haven't but it has been done, I presume.

Q. It has been done. You say you didn't know Mr. Schnee?

A. I didn't know him personally.

Q. And you say that you had seen him?

A. I had seen him a number of occasions, yes.

Q. Before this day? A. Yes.

Q. Where was the first occasion?

A. When he was maintainer at Willcox.

Q. How long before this day?

A. I can't recall that.

Q. Sir?

A. That is too far back, I can't recall it.

Q. You can recall you saw him moving his car and backing it up against the shed?

A. That was brought to my mind by reading the statement I made shortly after the accident.

Q. Where were you first encountered to make a statement? A. That I don't recall.

Q. You don't remember that? A. No.

Q. By whom were you encountered to make a statement?

A. In the superintendent's office. [162]

Q. And to whom did you make the statement?

A. I wrote the statement out myself and mailed it in to the superintendent's office.

Q. When?

A. Some time after the accident, I don't remember the date.

(Testimony of David Wisner, Jr.)

Q. Who told you it was this man you had seen moving the car that was involved in the accident?

A. Will you state that question again?

Q. Who told you it was this man that you had seen moving this car that was involved in the accident?

A. Different ones and from reports, a wire report on it.

Q. A wire report? A. Yes.

Q. When did you receive the wire report and where? A. I didn't receive one but I saw it.

Q. When did you see it and where?

A. It was possibly mailed to me later when I was asked to make a report on it.

Q. You don't remember? A. No.

Q. What were you carrying in your car that day?

A. All I had on my car was a track level to determine the gauge and level of the track.

Q. That was all? A. That is all. [163]

Q. No tools, nothing but a track gauge?

A. That is right, just small tools.

Q. Carrying no wood? A. No.

Q. When did you last inspect your car to determine what you had on board?

A. Before I left.

Q. You made an inspection to find out what you had on the car between seven and eight that morning? A. Yes.

Q. Anybody use that car besides you?

(Testimony of David Wisner, Jr.)

A. No.

Q. Nobody uses that car besides you?

A. No.

Q. You took Mr. Lyons to a certain point, let him off and went on about your affairs, is that correct? A. Yes.

Q. Why were you inspecting the road that particular day?

A. It is my duty, I go over it once or twice every week to inspect. At that time Mr. Lyons wanted to make this trip. Whenever I pass over it I am always looking at the track.

Q. Was it a regular inspection tour or were you accommodating Mr. Lyons, the assistant divisional engineer? A. You can say both, I guess.

Q. When had you last inspected the roadbed?

A. I can't remember.

Q. You can't remember. When had you last seen Schnee prior to this?

A. That I can't remember either.

Q. And while you were inspecting the roadbed that day, did you encounter any surveying parties of the Southern Pacific? A. No.

Q. Nowhere between the point west to the point east of Bowie? A. Not to my memory.

Q. Did you encounter any section gangs?

A. Yes.

Q. Where?

A. That I can't remember where. There are two gangs working between Bowie and Willcox, there are two section gangs.

(Testimony of David Wisner, Jr.)

Q. You don't know where you encountered them?

A. I don't know where I encountered them.

Q. Did you encounter both of them?

A. Yes.

Q. Bowie is east of Willecox, isn't it, railroad east?

A. That is right.

Mr. Gillen: I think that is all.

Mr. Thompson: That is all.

The Court: We will resume at 1:30.

(Whereupon, a recess was taken at 12:00 o'clock, noon, until [165] 1:30 o'clock, p.m.)

ROBERT W. WARD

recalled as a witness, having been previously sworn, testified as follows:

Redirect Examination

By Mr. Thompson:

Q. Before you left the stand I asked whether or not you made a statement to the Southern Pacific?

A. I did.

Q. You had seen that statement prior to the time you came on the stand this morning?

A. Yes, sir.

Q. And had refreshed your recollection from that statement?

A. Yes, sir.

Q. At the time of the accident I will ask you whether or not it was any part of your duty to investigate accidents?

A. No, sir.

Q. Did you occupy any position with the signalmen's union?

A. I did.

(Testimony of Robert W. Ward.)

Q. What was it?

A. Local chairman of the grievance committee.

Q. It was your duty to represent the men in that department?

Mr. Gillen: Just a moment. That is objected to as incompetent, irrelevant and immaterial.

The Court: He may answer. [166]

A. Yes, sir.

Q. You mentioned in your direct testimony the markings you said were on the stick or stake that was found at the scene of the accident. Were those markings completely around the stick or only on one side? A. All around the stake.

Q. To about what height?

A. About twelve inches.

Q. Now, Mr. Ward, I will ask you again about these battery jars, how wide and how deep did you say they were?

A. About fourteen inches deep and about four inches by five and a half. They are a little bit oblong, not oblong—what shape is that—a little wider than—

Q. A little longer than they are wide?

A. That is right.

Q. I think you were handed the Defendant's Exhibit A. Did you see that? Was that handed to you this morning? A. Not this morning.

Q. Will you examine it and see if that is the statement you referred to? A. Yes, sir, it is.

(Testimony of Robert W. Ward.)

Mr. Thompson: We offer the statement in evidence.

Mr. Gillen: Of course we will object to that. I would like to examine the witness on voir dire first as a basis for my objection. [167]

The Court: All right.

Q. (By Mr. Gillen): Mr. Ward, at the time you made that statement was Mr. Schnee present?

A. No, sir.

Q. Mr. Schnee at that time was confined in the hospital recovering from his injuries or being treated for his injuries? A. That is correct.

Mr. Gillen: I offer the objection the statement would be completely hearsay as to the Plaintiff Schnee, and it is offered as a self-serving statement of the defendant.

The Court: It is admitted.

(Defendant's Exhibit A in evidence.)

Mr. Thompson: May we read it to the Jury? First, the date of the statement, was it taken on the date it bears?

The Witness: I didn't observe the date.

Mr. Gillen: Now, I would like, before counsel reads the statement, in support of my previous motion I would like to supplement that with an objection that the statement contains numerous conclusions not based upon fact. I would like Your Honor to have the opportunity to look at the statement.

The Court: I will read it.

(Testimony of Robert W. Ward.)

(Document handed to Court.)

The Court: It is admitted.

Mr. Thompson: I may read it then.

“Southern Pacific Company Statement Relating to Accident. [168]

“I was signal maintainer at Willcox, Arizona, on Aug, 29, 1946, when Adolph Schnee was injured east of Willcox when the motor car on which he was riding was derailed. I was called by the station agent to identify Mr. Schnee at the doctor's office which I did and then went out to the scene of the accident. I was present at the time Mr. Albert C. Jacobson picked up the surveyors stake which was apparently the cause of this accident. This stake was about $1\frac{1}{4} \times 1\frac{1}{4}$ and about 30 inches long. I have been a signal maintainer for about 22 years and I have never used a stake of this kind to mix batteries. It would be too large to mix battery solution. After we picked up the tools we placed the car on a push car and took it into the Willcox station. Mr. Norman Wisner, section foreman, Ramon Abilla, section laborer, myself and other laborers picked this car up. We also found a piece of brake shoe laying near the scene of derailment, which had apparently been laying there for some time. Mr. Albert Jacobson, signal supervisor, Mr. Lyons, Asst. Div. Engr. at that time and another man I believe was Bob Glasser, out of the div. engr. office, were with me at the time the stake referred to above was

(Testimony of Robert W. Ward.)

found and this was the day after the accident at about noon. Robert W. Ward, Signal Foreman, Signal Gang 9, Tucson Division."

Q. (By Mr. Thompson): Was this stick or stake about which you testified, Mr. Ward, too large to have been put in a battery jar? [169]

A. I didn't hear that question, I am sorry.

(Question read.)

Mr. Gillen: I object to that question as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. No.

Mr. Thompson: That is all.

Recross-Examination

By Mr. Gillen:

Q. Did you talk to anybody over the noon hour, Mr. Thompson or Mr. Goins, the Claims Adjuster?

A. Relative to this, no, I didn't talk to either one of those gentlemen over the noon hour.

Q. Did you talk to anybody about your testimony or statement? A. No.

Q. You did not, over the noon hour. When did you last talk to them, to either of the attorneys or Mr. Goins?

A. I don't know what time but I talked to them yesterday.

Q. Yesterday? A. Yesterday.

Q. Now, did you talk to any of the other witnesses today about your testimony?

(Testimony of Robert W. Ward.)

A. Not about testimony, no.

Q. Did you talk to Mr. Wisner, Senior, about your testimony? A. I did not, no, sir. [170]

Q. You didn't tell him he was mistaken when he said he had gone out?

A. I did not, no, sir. I don't know that he said that.

Q. You didn't ask him about it?

A. No, sir.

Q. Now, with regard to this stake you referred to in your statement given to the Company, who was it that suggested to you that it was used to stir battery solution?

A. I don't remember that it was anybody, Mr. Gillen.

Q. You had never seen one used for that purpose, had you?

A. Not a surveyor's stake, no, sir.

Q. And you had trained men to be maintainers, had you not? A. I beg your pardon?

Q. You had trained men to be signal maintainers? A. That is correct.

Q. You had shown them how to build batteries, had you not? A. That is correct.

Q. When you showed them how to stir the solution you showed them how to stir it with a light wood paddle? A. That is correct.

Q. So with regard to this surveyor's stake that was found and placed under lock and key and since disappeared for some reason, all you can testify

(Testimony of Robert W. Ward.)

to is you observed some discoloration on the stick you concluded to be this solution?

A. That is correct. [171]

Q. You don't know whether it was that solution that left that marking on the stick, you don't know whether it was because it was used to stir a battery or because it had picked it up by lying on the road-bed, is that right?

A. No, I wouldn't say it that way if I understand your question correctly.

Q. Well, if you don't understand it I will try to clarify it. A. I wish you would.

Q. You don't know whether this stick ever was used to stir a battery?

A. I never saw it used to stir a battery, no, sir.

Q. Just your conclusion?

A. Just my conclusion.

Q. Was this stick, to your knowledge, ever put to a test to determine what this discoloration was? Was it tested chemically?

A. Not that I know of.

Mr. Gillen: That is all.

Mr. Thompson: That is all.

Q. (By The Court): That statement says a part of the stick was wedged under the car, is that so?

A. Yes, sir, part of a stick. Did it say "the stick?"

Q. Part of a stick. A. That is correct.

The Court: Do you want to ask him any more?

Mr. Gillen: That is all.

Mr. Thompson: That is all.

J. M. CARROLL

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Mr. Thompson: May I have these marked for identification as one exhibit?

(Exhibit B marked for identification.)

Q. Will you state your name for the record?

A. James M. Carroll.

Q. Where do you reside, Mr. Carroll?

A. 3209 North Geronimo Avenue, Tucson.

Q. How long have you resided in Tucson?

A. Since about 1935.

Q. What is your present occupation?

A. General contractor.

Q. What was your employment in August and September and October, 1946?

A. Junior Engineer, Engineering Department, Southern Pacific Company.

Q. As such junior engineer, did you from time to time have occasion to take pictures? [173]

A. I did.

Q. Referring to the Defendant's Exhibit B for identification, will you examine those pictures and say whether or not you have seen them before?

(Testimony of J. M. Carroll.)

A. Yes, I took these pictures.

Q. Do you recall when and where?

A. I took them at the Tucson yards in October of 1946.

Q. And at whose request, if you know?

A. The Claims Department.

Q. And with respect to the yards, whereabouts in the yards were they taken?

A. Up at the motor car yards, up by the motor car shop.

Q. And they were all taken the same day?

A. Yes.

Q. With what equipment were they taken?

A. I used, I believe at that time I used a 4/5 Speed Graphic.

Q. Those pictures are a fair representation of the motor car which was exhibited to you at that time?

A. Yes.

Mr. Thompson: I believe that is all.

Mr. Gillen: No questions.

The Court: Is that the motor car?

Mr. Thompson: Yes, we will avow it is. This witness, I am not able to establish it by him.

The Court: But you intend to? [174]

Mr. Thompson: I intend to establish it. The exhibit remains as an exhibit for identification.

The Court: You haven't offered it?

Mr. Thompson: I intend to, Your Honor, but I thought I would wait until I had identified it further.

R. F. GLASSER

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name?

A. R. F. Glasser.

Q. Where do you reside? A. Tucson.

Q. What is your occupation?

A. Road man.

Q. Road man? A. Yes, sir.

Q. How long have you been employed as a road man? A. As a road man a little over a year.

Q. Prior to that time what was your employment with the Southern Pacific Company, calling your attention to August and September, 1949, what was your employment at that time?

The Court: 1946.

Mr. Thompson: 1946, I mean. [175]

A. I was a road man at that time.

Q. Did you ever act as a photographer for the company at any time? A. Yes, sir.

Q. During 1946? A. Yes, sir.

Q. And took pictures for the Claims Department, did you? A. Yes, sir.

Q. As a part of your regular employment?

A. Yes, sir.

Mr. Thompson: Might we have these marked as Defendant's Exhibit C and number them in consecutive order.

(Testimony of R. F. Glasser.)

(Defendant's Exhibits C-1 to C-5, inclusive, marked for identification.)

Q. (By Mr. Thompson): Mr. Glasser, at any time in the latter part of August, 1946, did you have occasion to take any pictures at the scene of an accident near Willcox? A. Yes, sir.

Q. And who was with you when such pictures were taken? A. Mr. Jacobson.

Q. Mr. Jacobson? A. Yes, sir.

Q. What are his initials?

A. A. C. Jacobson.

Q. What was his position with the Company?

A. Assistant Signal Supervisor.

Q. Do you recall the first date you took any pictures with reference to a motor car accident east of Willcox in August, 1946, in September, 1946?

A. August 30th, 1946.

Q. And how do you fix that in your mind, Mr. Glasser, the date?

A. I just remember the date.

Q. Will you look at Defendant's Exhibit C-1 to C-5 and state whether or not you have seen those pictures before. A. Yes, sir, I have.

Q. Calling your attention now to C-1, the top one, where was that picture taken and what does it purport to represent?

A. That was taken in front of the motor car tool house at Willcox.

Q. And on the date you have mentioned?

(Testimony of R. F. Glasser.)

Q. And what does it purport to show?

A. It shows a piece of stick wedged——

Q. The whole picture?

A. It shows the underneath side of a motor car.

Q. Of a motor car? A. Yes, sir.

Q. Did you have any conversation concerning the motor car, where it came from, or did you know where it was before you [177] started taking the pictures of it? A. Not at this time.

Mr. Gillen: Well, if Your Honor please——

The Court: He says he doesn't know.

Q. (By Mr. Thompson): Where was it when you saw it on that date?

A. At the tool house.

Q. Was it outside the tool house?

A. No, sir, inside the tool house.

Q. C-2 for identification, what does that purport to represent and where was it taken?

A. It was taken in front of the tool house at Willcox and also shows the motor car.

Q. Was it the same date? A. Same date.

Q. And C-3, where was that taken; what does it purport to show?

A. It shows the track at the point of the accident, where it took place.

Q. You say the point of the accident. Where were you when you took that picture?

A. In reference to what?

Q. Where were you? In what part of the country were you? A. I was east of Willcox.

(Testimony of R. F. Glasser.)

Q. Do you know how far? [178]

A. No, I don't.

Q. How did you fix the place? Who fixed the place for the taking of the picture? Who told you to take the picture at that point?

Mr. Gillen: That would be hearsay, incompetent, irrelevant and immaterial.

The Court: Answer it.

A. I believe Mr. Jacobson.

Mr. Gillen: Just a moment, I move it be stricken if he is not sure.

The Court: Denied.

Q. Was Mr. Jacobson with you at that time?

A. Yes, sir.

Q. Of the next number, C-4, where was that taken and what does it purport to represent?

A. It is a picture of a tie.

Q. And is there anything unusual portrayed in that picture about that tie?

Mr. Gillen: Now, if it please the Court, the picture, if it is admissible at any time, speaks for itself and the photographer's conclusion or description of it is circumventing any ruling the Court might make.

The Court: All right. Sustained.

Q. (By Mr. Thompson): Did you examine the ties there at that place and time, Mr. Glasser?

A. Yes, sir.

Q. What if anything, of an unusual nature did you find at that point with respect to any ties you yourself saw?

(Testimony of R. F. Glasser.)

A. An indentation in the tie and ballast where something had struck.

Q. Did you take a picture of that scene?

A. Yes, sir.

Q. And that is Defendant's Exhibit C-4 for identification, is it? A. What is that?

Q. What you saw at that time is portrayed by Defendant's Exhibit 4 for identification?

A. Yes, sir.

Q. Now, Defendant's Exhibit C-5 for identification, what does that purport to show?

A. That is another picture of the track; also shows the indentation of the same tie in the other photograph.

Q. Those pictures, you saw the objects there of which those are pictures, there at that time?

A. Yes, sir.

Q. Do they fairly portray the objects of which the pictures are taken? A. Yes, sir.

Mr. Thompson: We would like at this time to offer in evidence the Defendant's Exhibits C-1 to 5 for identification, [180] if it please the Court.

The Court: Has Mr. Jacobson been a witness?

Mr. Thompson: No, he will be a witness.

The Court: This is subject to his identifying the location?

Mr. Thompson: Yes, Your Honor.

Mr. Gillen: Your Honor, certainly with regard to the motor car that is referred to in the earlier exhibits, in that same exhibit there has been no

(Testimony of R. F. Glasser.)

foundation laid to show this was the car involved that was portrayed by these pictures. With regard to the photograph of a scar on a tie, this photographer observed himself, I suppose that would be sufficient.

The Court: After they all have been coupled up, renew your objection, counsel. You took these pictures, did you?

The Witness: Yes, sir.

(Defendant's Exhibits D-1 to D-5 marked for identification.)

Q. (By Mr. Thompson): Will you examine those, starting with the one on top and tell me whether or not you have seen those pictures before?

A. Yes, I did.

Q. Who took those pictures, if you know?

A. I did.

Q. And where? A. At Tucson. [181]

Q. And when? Do you recall?

A. Around or about September 16th.

Q. And at whose direction did you take them?

A. Mr. Caldwell.

The Court: 1946?

The witness: Yes, sir.

Q. (By Mr. Thompson): At whose direction did you say? A. Mr. Caldwell.

Q. With respect to the yards, you say the Tucson yards, whereabouts in the yards were they taken?

A. Just east of the Broadway subway.

(Testimony of R. F. Glasser.)

Q. And in taking them in order, I will ask you this question, do all those exhibits from D-1 to D-5 inclusive, purport to show a motor car?

A. Yes, sir.

Q. And you saw the motor car there at that time, took the pictures? A. Yes, sir.

Q. The pictures fairly portray the motor car that was there at that time? A. They do.

Q. And you took them, is that right?

A. Yes, sir.

Mr. Thompson: That is all.

Cross-Examination

By Mr. Gillen:

Q. Do you have the negatives of those pictures?

A. No, sir, I don't.

Q. Were they originally blown into that particular size print? A. I don't know.

Q. Didn't you develop them?

A. No, sir, I only took the pictures.

Q. What did you do, take the pictures, then turn all the negatives, the film over to somebody?

A. Yes, sir.

Q. To whom?

A. To my supervisory officer.

Q. Who is that?

A. Mr. T. W. Saul's office.

Q. And that was the way both with regard to the pictures you took with Mr. Jacobson you understood to be the scene of the accident and the pictures

(Testimony of R. F. Glasser.)

you took in Tucson at the direction of Mr. Caldwell, the claims man, is that correct? A. Yes, sir.

Q. Are you acquainted with a city marshal of the town of Willcox, named Hallmark?

A. No, sir.

Q. Did you ever ask a police officer in Willcox to take you out to the scene of the accident? [183]

A. No, sir.

Q. You have no idea who developed the pictures?

A. No, sir.

Q. How many other pictures have you taken since you took those?

A. You mean of this accident?

Q. Since you took those pictures how many other pictures of accidents of cars or equipment or locations have you taken for the Southern Pacific?

A. I have taken lots of them.

Q. When you look at your pictures do you have a distinct recollection of seeing those things?

A. Yes, sir.

Q. You are not confused by the lots of other pictures you have taken? A. No, sir.

Q. When you were taking the pictures at Tucson with Mr. Caldwell, were there any objects placed in and about or upon any of the objects in the picture? A. Will you say that again?

Q. Were there any objects, any articles, placed on the motor car, in or about the motor car before you took the pictures? A. Only one.

Q. There was one; by whom was that placed?

(Testimony of R. F. Glasser.)

A. Myself and Mr. Caldwell. [184]

Q. You both placed an object on the motor car?

A. Not on the motor car, underneath the motor car.

Q. Underneath the motorcar, I see. I think that is all.

Redirect Examination

By Mr. Thompson:

Q. Will you look at the exhibit and give the number you refer to in giving answer to counsel's question? A. D-3.

Q. D-3 for identification; what was the object you referred to placing under it?

A. It was a stick.

Mr. Thompson: That is all.

Mr. Gillen: That is all.

Mr. Thompson: We will call Mr. Schnee for cross-examination.

ADOLPH J. SCHNEE

called as a witness by the defendant, having been previously sworn, testified as follows:

Cross-Examination

By Mr. Thompson:

Q. You have been sworn previously and testified, Mr. Schnee, in this case? A. Sir?

Q. You have been sworn previously and testified in this case?

(Testimony of Adolph J. Schnee.)

Mr. Gillen: It is stipulated he has. [185]

Q. Will you tell me when it was you entered the employ of the Southern Pacific Company, the date?

Mr. Gillen: Just a moment. I offer objections. It is incompetent, irrelevant and immaterial. I understand this witness is being called under the cross-examination rule, which we call 2055 in the California Code of Civil Procedure. I don't know what it is here; the right to cross-examine the adverse party on what I understand Your Honor has limited the liability in the case. I think the examination should be held to that.

The Court: At the present that is what we are trying, yes.

Mr. Thompson: The question was, if the Court heard the question, was when he was an employee of the Company. Did the Court rule?

The Court: There is nothing before the Court.

Mr. Thompson: I understood he objected to my asking him when he entered the employ of the Company.

The Court: He wanted to define the situation.

Q. (By Mr. Thompson): When did you enter the employ of the Company? A. July 1, 1946.

Q. July 1?

A. July 1. I believe I was examined before that but I wanted some time because they were going to send me down to Yuma on a [186] construction job with Mr. Frank Fields.

Q. What was the nature of your employment when you first went to work for the Company?

(Testimony of Adolph J. Schnee.)

A. I believe it was called Apprentice Helper or Helper Signalman, I forget.

Q. Where did you start to work?

A. I started to work in the Tucson yard.

Q. And doing what?

A. Mostly doing odd jobs, cleaning switches and when I would be with Jack Young, inspecting crossings, making sure the signals were working, I would make sure the traffic wouldn't be interfered with; I would also stand at a distance to observe whether the lights were working or not.

Q. Over how long a period of time did you work with Mr. Young? Can you answer that, tell us how long you worked with Mr. Young?

A. Not very long. It wasn't more than three weeks and perhaps as little as two.

Q. What was the nature of the work you did with Mr. Young, would you say?

A. As I said before——

Q. That was the extent of it?

A. I don't remember whether we did or whether he showed me to build any batteries or to repair any mechanisms, anything like that. [187]

Q. Did you go about with him on a motor car during the time you were working with him?

A. I certainly did go with him, other than the time he would go in the office to make his report, he would be sure for me to watch the car or push it out of the way of trains if they took the siding we were in. Your Honor, may I say something?

(Testimony of Adolph J. Schnee.)

The Court: Yes.

The Witness: Before you questioned me about who I first went to work with at the Tucson yard.

Mr. Thompson: I think I asked you the Company.

The Witness: I overlooked the fact that Mr. Jack Young at that very date, July 1, prepared to go on his vacation and actually he was on his vacation, but he did come around to see if everything was going all right, since the young gentleman's name, a student or part-time student of the university, had taken his job as relief maintainer.

Q. What is his name?

A. Currie Field or Field Currie.

Q. Did you work with him?

A. I worked with him.

Q. What did you do with him. What character of work were you doing under his supervision?

A. One particular job we did was inspect the bonding; that would be the east end of the Tucson district, right into the yard. I walked every mile of it. It took a few days. [188]

Q. What was the extent of that district?

A. The extent?

Q. Yes. How far out from Tucson did it extend?

A. Quite a distance. I couldn't give you the mileage, sir.

Q. Did you ride on a motor car with Fields—is that his name?

A. Fields, Currie Fields.

Q. Did you ride on a motor car with Mr. Fields?

(Testimony of Adolph J. Schnee.)

A. Yes, sir.

Q. Did you ever operate the motor car with Mr. Fields? A. No, sir, I didn't.

Q. Never at any time? A. I did not.

Q. You can't recall you at any time had your hands on the drive mechanism of the car?

Mr. Gillen: That is a question different than driving the car.

Mr. Thompson: I asked him that.

Mr. Gillen: I object to the question as having been asked and answered, if that is the intention, if he wants to know now whether he had his hands on any part, that is another question.

Q. (By Mr. Thompson): Did you ever operate the drive mechanism of the car during the time you were with Mr. Fields?

Mr. Gillen: Objected to as having been asked and answered twice.

The Court: You may answer. [189]

A. I did not, and I may explain——

Mr. Gillen: Just answer it, please.

Q. (By Mr. Thompson): How long were you with Mr. Fields?

A. Until he was dismissed—that is correct.

Q. How long a time was that?

A. That I couldn't specifically say.

Q. Was it a matter of days or weeks or what was it?

A. It was more than a week, I am sure of that, and I don't think it was more than two weeks, perhaps eighteen days.

(Testimony of Adolph J. Schnee.)

Q. During the time you were with Mr. Fields did you ever build any batteries or did he build any batteries with you while you were with him?

A. I have a distinct recollection of helping him replace a battery, that is, he was to build it and he cut out, what we call cut out a circuit that was being used on a siding into a pipe company on a North Main Street crossing and used the batteries from that circuit to put in a battery cart they needed them.

Q. At any time during that experience did Mr. Field build any batteries? Did you see a battery built, as you use the term?

A. As you use the term, I seen him build batteries and he would attempt to explain to me the nature of it, that is, the electrical character of it, and so on; and I assisted him in carrying water and so forth. [190]

Q. Now, would they build batteries, Mr. Schnee?

A. Well——

Mr. Gillen: Of course counsel may have some purpose in mind. We have had it explained once. Whether this young man knows how to build a battery or not wouldn't have any effect on the liability.

The Court: You may answer.

A. What was the question?

Q. I asked you to tell me how you go about building a battery? What did you do, what were the steps?

(Testimony of Adolph J. Schnee.)

A. Of course I learned a lot more about it later on, but at that time I was in a daze because he tried to tell me many things about the operation of the signals and everything else. I should say what I remember at that particular time?

Q. No, at any time. How do you build a battery?

A. Well, later on I learned the regular procedure of building a battery as Mr. Ward explained it to you.

Q. That is the way they are built?

A. That is right.

Q. As I understand it the water is placed in the battery jar first after you have a clean jar, is that correct?

A. The first thing you do is dump the old electrolytic solution first.

Q. Yes; when the jar is clean you fill it with water?

A. You remove it and get all of the rest of the electrolytic [191] out of it and dump it, too. Then you put, I believe the caustic soda first. I think that would be the proper way. I hesitate to say which one is first.

Q. Is there a process where it becomes necessary to stir it so that you have a thoroughly saturated solution?

A. That is correct.

Q. What is used for that purpose?

A. You use what is commonly called a maintainer's paddle.

Q. That is wood, iron, or what is it usually composed of?

(Testimony of Adolph J. Schnee.)

A. It is generally, I believe, somewhat like the flat piece of thin wood you get off an orange crate, the side at the reenforced ends.

Q. It is all wood?

A. It generally is. I don't know what kind.

Q. When you stir a battery solution of that kind, did you ever observe it left any stain upon the stick?

A. I really—I had not been there long enough to observe just how the solution acts on a stick of wood.

Q. Calling your attention, you say “there.” What do you mean, hadn't been where long enough?

A. I mean at Wilcox.

Q. Had you ever observed it in Tucson when you were helping these men?

A. Not particularly because it wouldn't be my place to do the actual work. I would assist in getting the various things, the [192] material together that goes to make it up.

Q. Did you ever see the man use the stick and stir the solution, did you ever see that during the time you were in Tucson? A. Yes, sir.

Q. How many times would you say you saw him do that?

A. I couldn't say how many times.

Q. More or less. Once?

A. Probably once.

Q. You think during all the time you worked in Tucson you only saw them build one battery?

(Testimony of Adolph J. Schnee.)

A. No, sir.

Q. All right. I will ask you the next question. During all the time you were in Tucson you only saw them stir the solution while they were building a battery one time?

A. I probably saw them do it more than once. I couldn't tell you the exact number of times. I believe it wasn't too many times because I wasn't coached to do those jobs.

Q. After it was over, did you take the tools back to the car?

A. I would take the water cans and I would take the little cartons and put them on the truck.

Q. Did you ever take the paddle back?

A. Generally—of course the maintainer makes a point that the paddle is dry; if it isn't they put it in something to put on the car.

Q. Did you ever do that? [193]

A. I might have.

Q. You don't recall now when the wood was placed in the caustic soda it made any discoloration?

A. I wouldn't know whether it did that or not immediately.

Q. Do you know whether or not it would do that ultimately? Did you ever see any paddles that had evidence of corrosive substance on them?

A. I would say it is reasonable for me to assume that.

The Court: Mr. Schnee, don't assume anything. If you saw any tell him, and if you didn't, tell him.

(Testimony of Adolph J. Schnee.)

A. No, I didn't.

Q. (By Mr. Thompson): During the time you were in Tucson and during the time you were at Willcox you had no occasion to observe whether or not that caustic solution had any particular effect upon the wood?

A. Later on when I worked in Willcox, Arizona, on my own, I of course observed, for one thing, if you had dirt on it, on the wood, of course it would come off the wood and come in with the solution. I was especially advised not to use a stick that was dirty, had paint on it or anything like that.

Q. So you did then, afterwards; while you were in Tucson you didn't at any time observe whether or not the caustic solution had any effect on wood?

A. Here in Tucson I had no occasion to pay particular attention to it. [194]

Q. Because of that you never observed any paddle or paid any attention to it?

A. I paid attention to the generality of the work. I wanted to put everything in my mind, therefore I lost a lot of facts of detail.

Q. When you got to Willcox you found out if you used a stick in this caustic solution it would have a cleansing effect, at least you found that out?

A. Yes.

Q. Did it look like a stick that had been in lye water? Have you ever seen a stick used in washing for a long time?

A. No, sir, we have a washing machine.

(Testimony of Adolph J. Schnee.)

Q. You don't know whether it resembles a stick that had been in a solution of lye, had a similar appearance?

A. I have had no occasion to work around lye.

Q. After you used this stick at Willcox during the time you were there, did it show more evidences of having been used in this caustic solution?

A. I don't think that, other than the observation I stated about a stick is the case, since I was extremely busy building many batteries on account of the district had been underworked, that is, no one had done any work.

Q. All right. Going back, when was the first time you ever operated one of these motor cars, Mr. Schnee?

A. I specifically recall the very day and Mr. Wallace, after [195] I had gotten my clothes together, got on the train, rush, rush; that particular day stood out in my mind as getting explicit instructions.

Q. You mean to say by that from the time you got on the train to go to Willcox you had never one time operated a motor car?

A. I had never at any time before that had control and sole responsibility of the motor car.

Q. I am not asking you that. I am asking you did you have occasion to operate the motor car, not when you were alone or with anyone; did you ever operate a motor car with Mr. Fields while he was directing you, or Mr. Young was riding with you or directing you?

(Testimony of Adolph J. Schnee.)

A. Not with Mr. Fields and not with Mr. Young especially, because he was kind of funny about it.

Q. Then do I understand you had never driven a motor car at all during the time you were in Tucson?

A. Not to the best of my knowledge.

Q. Just tell the Jury how these motor cars are operated. Explain it to them, Mr. Schnee.

A. From the point of starting out you have to get behind a car and push it and at the same time you take a sort of clamp in your left hand or right hand, whichever would be more convenient. If you were left-handed of course it would be a different story. Anyhow, this clamp has a point at each end, each side; when you press it together, I believe it completes [196] the circuit with the ignition system on this little engine and the throttle on it—well, I don't know how to term it—it is stationary. When you put it in any one position it stays there. I believe it has a clamp on the side that forces it to stay in place. Of course it has a part on it by which you can tighten the brakes. Then it has another lever, as I remember correctly, that tightens the belt. When you start out I suppose you could either—that is, after you had it started, you start from a running start and put your brake on; in the meanwhile holding on to this contact thing all the time, else your motor stops, and mount it. Then release your brake. Then of course operate your tension on a belt to gain momentum.

(Testimony of Adolph J. Schnee.)

Q. Your speed is more or less controlled by the tension of the belt, is it?

A. I don't know whether I was told it would be advisable or not.

Q. That is the speed of the engine that determines the speed of the car, is that right, ordinarily?

A. No, sir, I wouldn't say that, because the belt, you have an amount of slippage there I couldn't determine.

Q. It is driven by an engine, Mr. Schnee?

A. Yes, the power is derived from an engine.

Q. The belt, there is some slippage, but ordinarily the speed of the engine would determine the speed of the motor car; when you speed up the engine you speed up the car, is that correct? [197]

A. Generally speaking, yes.

Q. When was the first time you ever operated a motor car and where?

A. To my distinct recollection it was on the west side of the Willcox station.

Q. And who was with you at that time?

A. Mr. Wallace.

Q. He stayed with you how long?

A. I think that day he took me up there. He left me alone later on in the afternoon.

Q. What was the date you were taken up there?

A. I do not recall the exact date, but it was in the very beginning, the very beginning of August.

Q. What do you mean by the very beginning? Was it the first of August or was it the tenth?

(Testimony of Adolph J. Schnee.)

A. Well, it couldn't have been the tenth of August because part of my pay check in the two-week period was for helper or assistant signalman, one or the other, and the other part was made up as under signalman.

Q. So that it was then some four or five days after the beginning of August, is that your best recollection, or was it closer than that?

A. I would say about that time.

Q. Then you were working, then, as I understand, in Willcox from then until the time of your accident on August 29th? [198]

A. From then until August 29th.

Q. You were in Willcox some twenty-five or twenty-six days, something like that?

A. Just about.

Q. You were there at Willcox all that time, you didn't go anywhere else?

A. I think I got permission on a couple of Sundays to take off and be with my wife.

Q. But during all the working days for twenty-five or twenty-six days you were at Willcox?

A. That is right.

Q. What were your duties and what did you do while you were there those twenty-five or twenty-six days? Tell the Jury what you were doing.

A. My duties were, first of all it was impressed upon me to be sure not to take too many responsibilities on my shoulders in case of breakdowns, to overcome that, to get in touch with the signal main-

(Testimony of Adolph J. Schnee.)

tainer adjacent to this district, that would be in Bowie. I believe Mr. Wallace told me that would be the man he had informed me of, being a fresh man on the job.

Q. Those are things you are not to do, but what were you supposed to do?

A. I meant to say I got the report from him.

Q. What were you supposed to do as to the actual work?

A. As to the actual work was concerned, was especially observe [199] that all signals and signal lights were working after the trains had passed or while the trains were going over the track, and to rebuild batteries if they needed, and rebuilt especially the ones Mr. Wallace had pointed out to me and to especilaly keep the switches about the yard and at each siding clear of slack, dirt or anything else so it wouldn't interfere with the working of the signals.

Q. Were you ever told it was part of your duty to also observe the track and report anything that might appear to be of anything of danger on the track, or might interefere with the movement of trains or motor cars on the rails?

A. Especially I was told about the movement of trains.

Q. Was it part of your duty to report any obstruction, anything on the track that might be dangerous to the movement of the trains or motor cars?

A. I don't recall whether it was or not. I think it must have been.

(Testimony of Adolph J. Schnee.)

Q. Do you recall having taken an examination on safety rules prior to the time you went to Willcox, Mr. Schnee?

A. I recall being examined or was I called in front of somebody?

Q. However it was taken, were you required to answer some questions about the safety rules?

A. I was given a slip of paper with—I don't know how many questions on it, and I was told to take my time and to fill [200] it in at my own convenience or whenever I saw fit. It was entirely, well, like reading from a book and writing it down.

Q. You didn't take any trouble to find out what the safety rules were? Wasn't that the purpose of the examination, Mr. Schnee?

A. I don't know the purpose of the examination. I don't even know it was an examination. I did what I just told you.

Q. How long a time were you studying it over and preparing that examination from the safety rules?

A. I did it to the best of my ability and not in regards to the time because I was pressed for time in keeping up.

Q. All these various times, what period did you prepare it?

A. As a matter of fact, I put it in the mail the very morning, I believe, of the accident, that would be on the 29th.

Q. And in order to answer that you had to read the rule book, is that right, that was provided you?

(Testimony of Adolph J. Schnee.)

A. Yes, I had to read the rule book up to the point where I would find the answer in conjunction with the special question in this particular spot.

Q. At August 29th what had been your education?

A. Public education, I think it was just grammar school.

Q. And what grade did you reach?

A. Eighth grade.

Q. Did you have any special education after that?

A. When I was in the submarine service. [201]

Q. What training did you have there?

A. Diesel school, diesel electric, or diesel school and submarine school or both.

Q. Was that with the aid of books or purely instruction by word of mouth?

A. No, sir, by lectures mainly.

Q. No books in connection with it?

A. I believe the instructor would keep the daily processes of educating to himself. More or less he would give us notes, you see, just typewritten pages, one or two at a time.

Q. What had been your employment before you went to work for the Southern Pacific Company?

A. Directly before I went to work for the Southern Pacific lines I was employed, I was more or less self-employed, because the company I had worked for, a neon company on 905 South Fifth Street here in Tucson had the mortgage foreclosed; being un-

(Testimony of Adolph J. Schnee.)

employed I did various odd electrical jobs as electrician.

Q. You then had had some training as an electrician? A. Yes, sir.

Q. Prior to that time where did you work?

A. Prior to this self-employment?

Q. Yes.

A. I worked for this company again.

Q. That is in Tucson. Did you have any employment for any duration before you came to Tucson?

A. In New York City, sir.

Q. How long a time did you work there?

A. From January on until about July, 1944.

Q. You were at that time, at the time of the accident you were twenty-four years of age, were you not? A. Twenty-four or twenty-five.

Q. Saying you didn't know whether this was an examination or not, did you know what the purpose of having to answer these questions was; didn't you know, Mr. Schnee?

A. I think it was to facilitate or to more or less to accommodate your requirements.

Q. You knew it was so you would get some instructions in connection with the safety rules of the Company, didn't you, now, Mr. Schnee?

A. I did not, sir.

Q. You didn't know it was the purpose?

A. The reason I made that statement, sir, is because when I was hired I was given to understand I was to be employed in the construction gang at

(Testimony of Adolph J. Schnee.)

Yuma under Frank Fields and another man was put in my place immediately when I got a three-day detainment to tell my wife about it and arrange for being away from home. Now, when I was called up on this job, the reason I know it was unexpected was because I knew the man there that was working there.

Q. Mr. Schnee, you understood my question, did you not? [203] A. Yes, sir.

Q. I am asking you whether or not you did not know you were getting an examination so you would become familiar with the safety rules of the Southern Pacific Company? That was the purpose you were given the examination, so you would know what the rules provided, you knew that?

A. No, sir.

Q. You represented to the Company you studied the rule book, didn't you? A. I was told——

Q. Now, answer me. Did you represent to the Company you had studied the rule book? Did you give them a written statement to that effect? Do you know whether you did or not?

A. I did not give a written statement, I studied a book, no sir.

Q. You never at any time? A. No, sir.

(Defendant's Exhibit E marked for identification.)

Q. Mr. Schnee, did you in connection with your examination to the Company answer this question affirmatively: "Have you studied the book of rules

(Testimony of Adolph J. Schnee.)

dated November 14, 1943, for the maintenance of way and structures of the Southern Pacific Company?" And you answered: yes, you had, and signed your name to it.

A. Oh, yes, it is a question. I beg your pardon. I understood you to say did I make a written statement. I remember [204] signing my name, but I don't recall writing out had I represented reading the rules.

Q. But you did say you read the rules?

A. I signed my name to that.

Q. Did you read the rules?

A. I must have to get them in there.

The Court: Will you answer the gentleman. Did you read the rules or not?

A. Yes, sir.

The Court: All right.

Mr. Gillen: We will stipulate that is his examination, whatever the nature of it is.

Q. (By Mr. Thompson): Now, Mr. Schnee, what did you say you were employed for by the Southern Pacific Company? I understood you to say you were employed originally in construction work?

A. No, I was employed with the understanding especially I would be expected to leave town immediately for Yuma, Arizona.

Q. For what purpose? In connection with what type of operation?

The Court: He said with a construction gang.

A. Construction gang.

(Testimony of Adolph J. Schnee.)

Q. Isn't it a fact that you hired out in the signal department and that was what your application was for in the Company? [205]

A. Yes, sir, I had to go through that.

Q. That was what you hired out for was the signal department. You made application to become a signal employee? A. Yes, sir.

Q. Following your accident, Mr. Schnee, on August 29, 1946, did you make any written statements to anyone about the way that accident occurred?

Mr. Gillen: Can you fix a time, bracket the dates? When, ever since?

Q. (By Mr. Thompson): Ever since.

Mr. Gillen: Well, I think that is pretty general and remote. If he was referring to some time shortly after——

The Court: Cross-examine. He knows whether or not he made any written statement. I presume any time. Go ahead.

A. I remember being up in San Francisco in Mr. Gillen's office and making a statement to a Mr. Freeman, I believe.

Mr. Gillen: We will stipulate that was a deposition, if it please the Court.

(Defendant's Exhibit F marked for identification.)

Q. (By Mr. Thompson): Do you know Mr. M. O. Wallace? A. Yes, sir.

(Testimony of Adolph J. Schnee.)

Q. The gentleman who was here on the stand, I believe yesterday?

A. The gray-haired gentleman with the glasses, yes, sir. [206]

Q. He was the man that went with you to Willcox? A. Yes, sir.

Q. And he was Assistant Signal Supervisor at that time? A. That is right.

Q. Now, will you examine that document, please, Mr. Schnee, and see whether that is your signature that is appended to that?

A. It appears to be my signature. I don't quite write my name that way but it sure looks like it.

Mr. Thompson: We at this time, if it please the Court, offer this in evidence.

Mr. Gillen: I don't think it should be offered in evidence unless to determine the conditions. I note the date on that is August 30th, 1946, the day after the accident. Now, I think it should be established whether or not he recalls giving that statement to anybody, this man at that time.

The Court: You can ask him.

Mr. Gillen: Yes, Your Honor, I would like to. May I see that, please?

Q. (By Mr. Gillen): Mr. Schnee, do you have any recollection of anything that transpired with you or about you or around you on the date of August 30th, 1946, which would be the day after your accident? A. Absolutely not.

(Testimony of Adolph J. Schnee.)

Q. When, if you can tell us, is the first time you recall [207] being fully and completely conscious of what was going on about you and being rational?

A. I don't recall any particular date, but I do recall the incident of having my bandages removed from my head. I don't know what date that was.

Q. You recall having the bandages removed from your head? A. That is right.

Q. My question is do you have any recollection of the first time you were fully conscious of what was going on about you and you were able to understand and converse rationally?

A. I believe it was at that time or immediately after, because I distinctly remember a nurse suggesting to my wife to get some sort of shampoo to use for patients. It isn't a wet shampoo, it comes in some other form. You don't have to use any water.

Q. Was that the day the bandage was taken off your head?

A. I think it was after that, because it was still sore.

Q. Now, do you have any recollection of Mr.— I don't see here who was supposed to have taken this statement.

Mr. Thompson: Doesn't it say Wallace?

Mr. Gillen: Wallace is a witness, but it doesn't say who took this statement.

(Testimony of Adolph J. Schnee.)

Mr. Thompson: He took the statement.

Mr. Gillen: Is this his handwriting?

Mr. Thompson: I presume so, that is my advice. [208] He took the statement.

Mr. Gillen: It isn't contended this is Schnee's handwriting?

Mr. Thompson: No.

Q. (By Mr. Gillen): Do you have any recollection of Mr. Wallace on the day following your accident, August 30th, 1946, writing out a statement of facts purportedly furnished by you on a Form 2611 bearing what you have identified as a signature appearing to be your signature?

A. I didn't follow your statement all the way.

(Question read.)

A. I get lost in there. I can't follow the whole statement.

Q. Do you remember anything that happened to you in St. Mary's Hospital in Tucson following this, any consciousness of anything happening to you?

A. No, sir.

Q. Are you conscious of having talked to anybody about the details of your accident, on that day?

A. Absolutely not.

Q. Are you conscious or have you any recollection of having particularly talked to Mr. M. O. Wallace and giving him a statement of the details of your accident on that day?

A. No, sir.

Q. Do you have any distinct recollection or any

(Testimony of Adolph J. Schnee.)

recollection [209] of reading what appears to have been typewritten in around your signature, "I have read and understand the foregoing statement and it is true and correct to the best of my knowledge and bleief." Do you recall anything of that sort being brought to your attention on the day following your accident?

A. No, sir, I don't recall ever seeing that type of form or number until this morning. I believe you mentioned it the first time.

Q. When was the first time after your accident you recall seeing Mr. Wallace or talking to him?

A. I do remember talking to him about my pay check being held up.

Q. How long was that after the accident, if you know?

A. I can't say the correct date. It was sometime after the period, I remember, the period after the doctor removed my bandages and stitches, I remember that, but before that I do not. I think it was after that. As a matter of fact, it must have been because my pay check came through long, long after it was due?

Q. When was it due?

A. I think it was due about six days or something, six days after the first or sixth.

Q. Six days after the first of September?

A. Yes, sir. I couldn't swear to it. I say I think. [210]

(Testimony of Adolph J. Schnee.)

Q. Do you recall talking to Mr. Wallace?

A. Yes, sir.

Q. About your pay check? A. Yes, sir.

Q. Do you recall ever giving Mr. Wallace a statement about the details of the accident?

A. No, sir, I don't recall anything other than trying to find out from him at a later date what happened.

Q. You tried to find out at some later time what happened?

A. I mean by later date a date after they did the work on my head.

Q. You mean after they removed the bandage?

A. Sometime after that. I remember trying to find out what happened after the accident, how I was hurt and in the condition I was in.

Mr. Gillen: May I hand this to the Clerk and ask the witness to be permitted to look at this signature?

The Court: If this was a release, which it hadn't that effect on this showing—I don't know whether the rules are the same on this exhibit or not. Anyhow, on the present offer I will reserve ruling. Are you through with your voir dire? You are going to make a further showing?

Mr. Gillen: I would make a further showing by other witnesses.

The Court: Wait, he is going to take the floor now. You [211] can come in again.

Mr. Gillen: Very well, sir.

(Testimony of Adolph J. Schnee.)

Mr. Thompson: I think it is premature; I should ask him whether or not he made the statement.

Mr. Gillen: Just a moment. May I interrupt. If counsel is going to ask him specific alleged or purported statements out of that statement, then I would ask permission of the Court to permit me to make a further showing.

The Court: I will take care of that. I don't think he is going to do that. Ask your question.

Mr. Thompson: If it please the Court, I was going to ask him if he made certain statements that appeared here.

Mr. Gillen: Then I ask permission to put on further testimony.

The Court: You mean of him?

Mr. Gillen: I ask permission to put on the testimony of witnesses that saw the plaintiff daily from the inception of his entrance into the hospital for a period during the time of his treatment.

The Court: Mr. Gillen, pardon me. On the present showing, Mr. Thompson, I don't feel disposed to make any reference to what is in the body of it, on the present showing.

Mr. Thompson: May we then, if at a later time the Court permits us to reintroduce it, may we recall the defendant for further cross-examination. [212]

The Court: Certainly.

Mr. Thompson: Will you mark these?

(Testimony of Adolph J. Schnee.)

(Defendant's Exhibit G marked for identification.)

Q. (By Mr. Thompson): Will you examine Defendant's Exhibit G for identification and state whether or not each of those two pages bear your signature, Mr. Schnee. A. "G"?

Q. That is "G."

A. This has got "G" on it.

Q. It is one document.

A. May I read this?

Q. Certainly. First, let me ask you, look at the signature and tell me whether it is your signature?

A. This looks like my signature.

Q. All right. Look on the next page, is that your signature?

A. Yes, sir, this looks like my signature. Can I read it now?

Mr. Gillen: May I have the date of those documents?

Mr. Thompson: "G" is September 3.

The Court: He has finished it, Mr. Thompson.

Q. (By Mr. Thompson): You said that was your signature there on those two pages, Mr. Schnee? A. Yes, sir.

Q. Do you recall making the statements that appear on that exhibit, Mr. Schnee? [213]

A. No, sir.

Q. You don't recall seeing Mr. Caldwell out there and talking to him about how the accident occurred on September 3? A. No, sir.

(Testimony of Adolph J. Schnee.)

Q. Have no recollection of it at all, is that right?

A. I remember after the incident I mentioned talking about it, trying to find out what happened. That is after this work or cleaning or removing the stitches, whatever it was, on my head.

Q. You don't know when that was, then?

A. I don't recall the date, no, sir.

(Defendant's Exhibit H marked for identification.)

Mr. Thompson: If it please the Court, at this time I would like permission of the Court, for the record at least, to examine the defendant with respect to specific statements. I presume the Court's ruling would be the same?

The Court: Yes.

Mr. Thompson: Would you hand him Defendant's Exhibit H?

Mr. Gillen: Is that the statement of the doctor?

Mr. Thompson: Statement of the doctor.

Q. Looking now at Defendant's Exhibit H, Mr. Schnee, and in the middle of that page tell me whether or not that is your signature?

A. It does, looks like it.

Q. What date does that bear? [214]

A. 8-29.

Q. What date does the statement bear?

A. January 28th.

The Court: What year?

A. It doesn't say the year.

Mr. Gillen: That is a rubber stamp that was put

(Testimony of Adolph J. Schnee.)

on there. It isn't established who put it on there. Some rubber stamp put on the side of the paper.

Mr. Thompson: Calling your attention to the first line there, Mr. Schnee, that purports to be dated 10-3-46, does it not?

A. 10-3-46, that is right, sir.

Q. Now, on October 3, 1946, did you make the statements to M. Stewart that appear above your signature? Did you give her that information and sign that report? A. October 3?

Q. October 3, 1946.

Mr. Gillen: Identify M. Stewart.

Mr. Thompson: M. Stewart being the clerk, one of the clerks at the Southern Pacific Hospital.

A. At the Southern Pacific Hospital?

Q. Here in Tucson, or sanitorium, I guess they call it.

A. I never made such a statement. I don't recall ever seeing such a paper like that in the hospital.

Mr. Thompson: If it please the Court, now this being [215] dated October 3, 1946, I want to ask the witness specifically about this statement, specifically when he made it.

The Court: My feeling is you had better put on Miss Stewart and Mr. Wallace, whoever it was, and make your offer in connection with their testimony.

Mr. Thompson: Fine. If the Court please, at this time, with permission of the Court, I would like leave to withdraw the witness on his cross-examination and call Mr. Caldwell, one of the

parties named on the statement, if it please the Court.

The Court: Do you want to examine the plaintiff to this point?

Mr. Gillen: No, Your Honor.

JOHN D. CALDWELL

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name, please.

A. John D. Caldwell.

Q. Where do you reside, Mr. Caldwell?

A. Mill Valley, California.

Q. What is your occupation?

A. I am a claims agent.

Q. For whom? [216]

A. Southern Pacific Railroad.

Q. How long have you been so employed?

A. I was employed in February, 1942, and I was in the Army for three years and I went back to work in the same position—let's see, it would be November, 1945.

Q. Where were you working in August, 1946, Mr. Caldwell?

A. I was working in Tucson, Arizona.

Mr. Thompson: It is perfectly proper to elicit all of the testimony I want to bring out from this witness, not only with respect to this document but complete with him entirely?

(Testimony of John D. Caldwell.)

The Court: Let's see how it develops, Mr. Thompson.

Q. (By Mr. Thompson): You were working here in August, 1946? A. I was.

Q. Was there reported to you an accident which had been sustained by the plaintiff, Adolph Schnee?

A. There was.

Q. Are you acquainted with Mr. Schnee?

A. I am.

Q. When did you first become acquainted with him? A. The date?

Q. Yes.

A. I don't know the exact date. I first saw him, I would say, some three or four or five days after the accident.

Q. Is that the first time you had met him?

A. That is the first time. [217]

Q. At any time. At that time where did you see him?

A. I saw him at St. Mary's Hospital.

Q. Do you recall whereabouts in the hospital?

A. Yes, it was in the orthopedic ward on the second floor in a room I occupied about a month later.

Q. Did you have any discussions with him at that time? A. I did.

Q. Were there any other persons present?

A. At the time the statement was discussed, that is the information was taken and the statement was written, no. At the time I read the statement to him and he read it and signed it, yes.

(Testimony of John D. Caldwell.)

Mr. Gillen: Just a moment. I move that the portion of the answer "and he read it" be stricken as an opinion and conclusion.

The Court: Denied.

Q. (By Mr. Thompson): What time of day was it when you first saw Mr. Schnee.

The Court: Which exhibit are you talking about? Give the number.

Mr. Thompson: This is Defendant's Exhibit G for identification.

Q. When you first saw Mr. Schnee, on the date the first time you saw him, what time was it?

A. I would say between 10:30 and 11:00 o'clock in the [218] morning.

Q. And at that time had you had any information about the details of this accident that had been sustained by Mr. Schnee? A. I had not.

Q. What was the extent of your knowledge of the facts surrounding the accident when you went out there, if any?

A. It is my recollection I had either received a call from the superintendent's office or had received a flash report stating that Mr. Schnee had been injured in a motor car accident and that was delayed somewhat after the accident. Maybe within a day or two after the accident I went out to see him.

Q. Did you go out to see him in connection with your duties in the claims department of the Southern Pacific? A. I did.

(Testimony of John D. Caldwell.)

Q. Where was Mr. Schnee in respect to the room? Was he in his bed in the hospital?

A. He was.

Q. I will ask you whether or not you introduced yourself to him? A. I did.

Q. How long were you there at that time, talking with Mr. Schnee?

A. I would say between an hour and an hour and a quarter. [219]

Q. What transpired? Just tell the Jury in your own words what he said, what you said and what was done there at that time.

A. You want me to tell the whole story?

Mr. Gillen: Just a moment. I would like to have an opportunity to examine this witness on voir dire.

The Court: You may.

Q. (By Mr. Gillen): Mr. Caldwell, what was the appearance of Mr. Schnee when you went into the room to see him?

A. He appeared to be alert, without pain, but he had numerous abrasions on him. I don't recall whether he was in traction or not. Other than that, I believe now—I wouldn't swear because it is some time ago, but if my recollection is correct I believe his head was shaved.

Q. His head was shaved?

A. It has been four years ago, nearly, but that is my best recollection. See, I had considerable personal contact with Mr. Schnee about a month

(Testimony of John D. Caldwell.)

and a half after this when I was in the hospital with a fractured hip and pelvis and he was in a room adjoining me and would come over and see me quite often. I don't know whether his head was shaved at that time or maybe a month and a half after.

Q. You can't tell us just how he looked at that time? A. Yes.

Q. Was his head shaved or wasn't it on that first visit? [220]

A. I would say my best recollection is that his head was probably shaved.

Q. His head was probably shaved?

A. Yes.

Q. You don't know, do you, Mr. Caldwell?

A. No, I don't know so far as his head.

Q. Was he in traction, was there any extremity of his in traction?

A. I don't believe it was.

Q. Was there any extremity of his you observed in bandages?

A. I believe his knee was in bandages.

Q. You saw his knee?

A. I believe it was. I believe I did.

Q. Do you remember the circumstances under which you saw his knee?

A. I believe it was warm and possibly the bed covers were off his limb.

Q. It was warm and the bed covers were off his limb? A. That is right.

(Testimony of John D. Caldwell.)

Q. That is your recollection?

A. That is right.

Q. Is that the only extremity you observed that had any bandages on?

A. I believe his right foot was bandaged also.

Q. What kind of bandage? [221]

A. I am not a doctor. I cannot describe the type bandage.

Q. Can you describe what it looked like, particularly when you had some experience.

A. I don't know the name of the bandage.

Q. I am not asking you that.

A. It was a gauze bandage on his foot.

Q. Do you have a distinct recollection of that?

A. No, I don't have a distinct recollection.

Q. How about his hands?

A. I don't recall whether his hands were bandaged or not.

Q. How about his head?

A. As I said, I believe his head was shaven and may possibly have had a bandage there.

Q. Is that the best description you can give?

A. That is right.

Q. Now, did you discuss with him any treatment he was receiving?

A. I asked him if he was receiving good treatment; he said he was.

Q. He was very alert and out of pain?

A. That is right.

Q. Did he tell you he was out of pain?

(Testimony of John D. Caldwell.)

A. He did.

Q. Said he had no pain at all? [222]

A. He said he was feeling good.

Q. You have a distinct recollection of that?

A. I do.

Q. Mr. Caldwell, don't you know as a matter of fact that this man on the 29th day of August, 1946, immediately after his arrival in the hospital, was found to have a fractured skull and a large wound that exposed the skull on his scalp which had to be sutured and his right leg was swathed in bandages; that there was a cast placed on his right hand; that there was a full leg cast placed on his right leg—I beg your pardon, on his left hand; there was a full leg cast placed on his right leg and a full leg cast placed on his left leg, and that was the condition he was in on August 30th. He was under morphine and other narcotics; he was irrational for a period of three weeks.

A. No, sir. As a matter of fact, I checked with the nurse before I went there and ask if he had any morphine, narcotics or sedative, and she said positively not.

Q. How many times did you visit him on that occasion? A. I don't recall.

Q. Don't you recall for a period he was in an oxygen tent? A. No, sir.

Q. For a period of a week he was in an oxygen tent? A. I do not know that.

Q. If I showed you the hospital records wouldn't it refresh [223] your recollection?

(Testimony of John D. Caldwell.)

A. It probably wouldn't. I am not a doctor.

Q. You know what an oxygen tent is?

A. I think I do.

Q. It is an isinglass affair and oxygen pours in enough to keep him alive, you know that?

A. Yes, sir.

Q. You have been around hospitals as a claims man?

A. Not so much.

Q. You are in and out of the hospital, the Southern Pacific Hospital in San Francisco?

A. I have not been in the Southern Pacific General Hospital except to go out and visit a doctor.

Q. You do know what an oxygen tent looks like?

A. Yes, sir.

Q. Do you know what an oxygen mask looks like?

A. I don't know that I saw an oxygen mask.

Q. Did you ever see this man in an oxygen tent or oxygen mask?

A. I never did.

Q. You never did?

A. No, sir.

Mr. Gillen: I have concluded my examination on voir dire of this witness, but before this witness is permitted to testify to any details or testify, I ask your Honor's [224] permission to put on other testimony in support of my contention which I will be glad to incorporate in an offer of proof under any conditions your Honor suggests.

The Court: You may continue. The request is denied. Continue your examination.

Q. (By Mr. Thompson): Now, at this time,

(Testimony of John D. Caldwell.)

Mr. Caldwell, calling your attention to the first date you saw Mr. Schnee, and by referring to the Defendant's Exhibit G, can you tell me what date that was?

A. It was taken on September 3, 1936.

Q. You say you were there and talked with him for some period of time in the forenoon, is that correct?

A. That is right.

Q. The subject of that conversation was principally the accident and how it occurred?

A. I asked him of certain events leading up to and including the accident.

Q. And he answered you? Did he give you the answers?

A. He did.

Q. I notice that the document Defendant's Exhibit G, is typewritten. Where was it typewritten and how was it taken?

A. I took the statement in long hand. I am not too legible a writer; I went home for lunch at noon time and my wife, I gave her the longhand draft and she can read my writing and she typed out this original statement here and [225] returned to the hospital, possibly one o'clock, about that time and I went into Mr. Schnee again—I call him "Johnny"—went into his room and asked the nurse to come in with me, the supervisor. She came in and I read the statement to him and I gave it to Mr. Schnee and he read it. I asked him if it was true and correct and he said it was and he signed it, both copies of it.

(Testimony of John D. Caldwell.)

Q. Did the nurse who was there——

A. She witnessed it and both copies, I believe, yes.

Q. And he told you at that time that it was true and correct, is that correct?

A. That is just right.

Q. Calling your attention to the scene of the accident, at any time after September 3rd did you have any occasion to make any further investigation with respect to this particular accident?

A. I did.

Q. What was the nature of that investigation, Mr. Caldwell.

A. I went to Willcox and contacted the Marshal there and another man—I don't recall his name right off, I believe he was a miner by occupation. I took statements from both of those men regarding what they observed at the scene of the accident afterwards.

Q. Calling your attention, do you remember the Marshal's name? [226]

A. Was it Dick somebody. He is a one-armed gentleman, has one hand, I should say.

Q. You have seen him here in the courtroom?

A. That is right.

Q. And the other man, do you recall what his name was?

A. I would remember it if it was given me, but I can't recall right now.

Q. Then did you take any other further state-

(Testimony of John D. Caldwell.)

ments in connection with that particular accident, that you recall? A. Yes, I did.

Q. What other statements?

A. I took a statement from the signalman.

Q. And then at any time later did you have any occasion to observe or find the car which had been involved in this accident? A. I did.

Q. Did you locate the particular car?

A. Yes. It had a tag on it that said on the tag——

Q. Just a moment. You located the car?

A. Yes, sir.

Q. Where?

A. It was down at the motor car repair shops in Tucson.

Q. I will ask you whether or not under your direction any photographs were taken of that car by anyone under your direction? [227]

A. There were.

Q. Who took the photographs?

A. I believe Mr. Glasser.

Q. I hand you Plaintiff's Exhibits 1, 2 and 3 and ask you if you have seen those photographs before?

A. Yes, sir.

Q. And do you know where they were taken, those pictures?

A. They were taken out by the motor car repair shops in Tucson.

Q. I will ask you to state whether or not those are pictures of the motor car which was involved in the accident involving Mr. Schnee?

(Testimony of John D. Caldwell.)

A. They are.

Q. Calling your attention to Defendant's Exhibit B, I ask you to examine those—one other question about the 1, 2, 3, are those fair representations of the car as it appeared at the time the photographs were taken? A. They are.

Q. Then looking at Defendant's Exhibit B, do you recognize those? A. Yes, sir.

Q. You have seen them before?

A. Yes, sir.

Q. What do they represent, portray?

Mr. Gillen: Of course the pictures speak for themselves, [228] Your Honor.

Mr. Thompson: I don't think they have been admitted in evidence yet.

The Court: Answer the question.

The Witness: What was the question?

The Court: What they represent.

A. They represent the motor car Mr. Schnee was riding on at the time of the accident.

Q. Do you recall when they were taken?

Mr. Gillen: I move it be stricken. There is no foundation to show he knows the motor car Mr. Schnee was riding on at the time of the accident. There is some testimony here he received some hearsay concerning what was the motor car.

The Court: Motion denied.

The Witness: I didn't get the question.

(Last question read.)

(Testimony of John D. Caldwell.)

A. If my recollection is correct I believe these were taken some time later than the other pictures. I believe the first set you showed me was taken along in September and these in October. I don't know the exact date.

Q. They were all taken at the motor repair shop, is that correct? A. That is correct.

Q. Calling your attention to Defendant's Exhibit D-1 to D-5 for identification, I will ask you if you have seen those? [229] You have seen those before? A. I have.

Q. They represent what?

A. They represent the car Mr. Schnee was riding at the time the accident occurred.

Mr. Gillen: Same objection, if it please the Court, same motion.

The Court: Objection overruled. Now the question.

A. (Continuing): Taken near the motor repair shop in Tucson.

Q. In connection with that exhibit, I notice there is a stick shown in the pictures. What was that picture, if you know?

A. I don't know exactly what the stick was.

Mr. Thompson: Let me see those again just for a moment.

Q. Calling your attention to D-1 to D-5, I notice there is a stick shown there in various places in the photograph alongside the motor car.

A. A yard stick, you mean?

(Testimony of John D. Caldwell.)

Q. Was it a regular yard stick?

A. It was.

Q. Do you know who was holding the yard stick when it was taken? A. I was.

Mr. Thompson: I believe that is all. [230]

Cross-Examination

By Mr. Gillen:

Q. Now, have you got your original notes on the statement you claim you took from the plaintiff, Schnee, at St. Mary's Hospital in Tucson?

A. It is right here. Is that what you refer to? The original statement is right here.

Q. The original notes.

A. I didn't make any notes, all I had was this same statement written out in longhand.

Q. That is what I am talking about.

A. I don't have those, no, sir.

Q. What did you do with them?

A. I imagine my wife destroyed them at home. I didn't see them again, so far as I recollect.

Q. You didn't retain the notes?

A. I did not.

Q. You claim you asked some questions and received some answers from Mr. Schnee at the hospital, and that you wrote them down and took them home because your handwriting is so poor and only your wife understands it; you had her retype them?

The Court: He didn't say only his wife.

A. I didn't say that. I went up to Mr. Schnee

(Testimony of John D. Caldwell.)

and interviewed him and he told me the story, how the accident occurred, [231] and I wrote it down. It wasn't a question and answer proposition. He told me and I wrote it down.

Q. You wrote a summary of it in your own words? A. I wrote what he told me down.

Q. You wrote a summary of it in your own words?

A. I wrote what he told me down in the statement in my words.

Q. That is what I say, a summary of what he told you. A. If you want to call it that.

Q. What you claim he told you. Did you take a statement from Mr. Dick Hallmark the City Marshal of Willcox? A. I did.

Q. Did you do that in the same manner?

A. I did.

Q. Did you take your longhand and have it re-typed? A. I did not.

Q. Was Mr. Hallmark able to read your writing?

A. I presume he could. He signed it and said he could.

Q. As a matter of fact, Mr. Hallmark took a statement away from you you had written out in your own words and tore it up and threw it away, isn't that a fact? A. He did not.

Q. Do you deny that? A. I do.

Q. Isn't it a fact that you wrote into the statement that [232] you were taking from Mr. Hallmark that the motor car, when Mr. Hallmark

(Testimony of John D. Caldwell.)

arrived at the scene of the accident, was headed railroad west instead of railroad east, and that he told you when you read that that he didn't say that; that he took the paper out of your hand and tore it up and said, "If you want a statement from me, you put down what I told you, not what you want to put down."

A. That is not true.

Q. You deny that happened? A. I do.

Q. Who was present when you took the statement from Mr. Hallmark?

A. Just Mr. Hallmark and myself.

Q. Do you have the statement Mr. Hallmark made? A. I don't have it, no.

Q. Do you have it, counsel?

Mr. Thompson: Yes.

The Court: You can read that after you recess, and go ahead with this witness, Mr. Gillen.

Mr. Gillen: All right, Your Honor.

Q. So there can be no question about it, you deny such an incident as I related between you and Mr. Hallmark ever took place?

A. That is correct.

Q. We would like for you to show, or have this shown to the [233] witness and ask him if this is in his handwriting with the exception of the purported signature.

Mr. Henderson: I believe it should be marked for identification, Your Honor.

The Court: You are willing to have your number?

(Testimony of John D. Caldwell.)

Mr. Gillen: I haven't had an opportunity to read it yet. I never claim anything until I read it.

The Court: All right. Give it to the defendant.

(Defendant's Exhibit "I" marked for identification.)

The Court: He wants to know if that is your handwriting? A. It is, sir.

Q. (By Mr. Gillen): It is my understanding, Mr. Caldwell, they permitted you in the hospital to visit with Mr. Schnee for between an hour and an hour and a quarter in the forenoon of the day which I believe is identified tentatively as September 5, 1946? A. Was it the 5th?

Q. Is it the 5th or 3rd? I am not trying to confuse you on the date. September 3, 1946. That would be five days after the accident, is that correct? A. That is correct.

Q. How long did you stay with him in the afternoon when you brought back the notes you immediately typed to replace your handwriting?

A. Possibly fifteen or twenty minutes, maybe twenty minutes. [234]

Q. Did you see Mrs. Schnee, either in the forenoon or afternoon of that day?

A. I don't recall.

Q. You are acquainted with Mrs. Schnee, are you not? A. I am.

Q. You don't recall seeing her in the period from an hour to an hour and a quarter that morning? A. I don't recall.

(Testimony of John D. Caldwell.)

Q. Do you recall a man in the same room on that day, a patient, I mean?

A. There may have been. There were two beds in the room. I don't recall whether there was a man there or not.

Q. You paid a number of visits back to Mr. Schnee subsequent to September 3rd?

A. I didn't say that.

Q. Did you?

A. I probably saw him again, I don't know how many times I saw him after that.

Q. Do you remember paying him a visit about three weeks after the accident? Where you made some arrangement for him to draw some advance of money?

A. I don't remember the date. I know several advances were made.

Q. Do you remember when you talked to him about the first advance? [235]

A. I don't remember the date, no, sir.

Q. As a matter of fact, isn't that the first time you found Mr. Schnee rational and able to talk to you?

A. It was not.

Q. Did you ever visit with him when Dr. Francis was present?

A. I may have.

Q. You don't remember?

A. I wouldn't say definitely. I talked to Mr. Schnee almost every day for a period of almost over a month and Dr. Francis would come in and see me and also Mr. Schnee.

(Testimony of John D. Caldwell.)

Q. I am not talking about after you were hurt yourself, but while you were actively engaged as a claims man before you got hurt.

A. I don't recall.

Q. Was there any reason, Mr. Caldwell, why you took your notes home to your wife and had them typed, other than the explanation you have given us?

A. There is one other possible explanation.

Q. I don't want any possible explanation, I want your own explanation.

A. It would save time. On these statements I am required to make a copy of the original and my wife in this particular case would put in carbon papers and save time of copying the original statement again. [236]

Q. Which was it, to save time or because your handwriting was bad?

A. It was principally because my handwriting was bad.

Q. You call your handwriting hard to read, is that correct?

A. On that particular day.

Q. Was there something wrong that day that made your hand a little bit difficult in the forenoon of that day, made it hard for you to write?

A. Oftentimes when you are taking a statement and a person changes their story or goes and makes changes in it and you have to cross out, it makes it illegible and ordinarily I am not too good a writer.

(Testimony of John D. Caldwell.)

Q. Were there any changes you recall Mr. Schnee made in his story or you made in his story on that date?

A. I don't recall whether or not there were now. It isn't unusual, I will say that, that changes are made.

Q. Now, you say Mr. Schnee was quite alert and bright to everything going on about him and was in no pain and so expressed himself?

A. That is right.

Q. Did he rattle off a story in good sequence or was it a story you had to get out of him by plying with questions?

A. You would have to question him.

Q. What was the story on that day?

A. I said you would have to question him, ask him questions [237] and he would give answers and part of the time he would go ahead and continue on without any questions.

Q. Did it take you from an hour to an hour and a quarter to get that short statement out of him?

A. It did.

Q. Yet you say he was alert and bright?

A. That is right.

Q. Alert to what was going on about him and not in any pain?

A. That is correct.

Q. You didn't attempt to put the statement down in question and answer form?

A. No, sir.

Q. Now, on the afternoon when you returned

(Testimony of John D. Caldwell.)

with the typewritten statement, did you bring with you your original notes?

A. I don't recall. I am quite certain as I think it over I left them at home.

Q. You didn't bring the typewritten statement and say, "Here, Johnny, here is the typewritten statement my wife has done nicely and neatly, so you can compare it with what you said this morning; here are the original notes I made; read them both and if they are all right, sign it?"

A. No, sir. I read him the statement and he agreed that was exactly how the accident occurred and then he read it over [238] himself and agreed to it.

Q. He read it over himself? A. He did.

Q. Did he appear as alert and free of pain in the afternoon as he did in the morning?

A. He did.

Q. Tell you he was feeling fine?

A. Feeling good.

Q. Looked good? A. He did.

Q. Did you take any notice of what the condition of his head was that afternoon or in the afternoon?

A. No, I don't recall.

Q. You don't recall whether it was bandaged or not? A. I don't recall.

Q. Did you ever go to the scene of the accident?

A. I did.

Q. When?

A. The same date I took this statement from Mr. Hallmark, is that his name?

(Testimony of John D. Caldwell.)

Q. Yes, Dick Hallmark; that was September 25, 1946, is that the first day you went out to the scene of the accident? A. It was.

Q. You say that when you first saw the car you didn't know of your own knowledge whether that was the car involved in [239] the accident or not?

A. There was a tag——

Q. My question is, you didn't know of your own knowledge whether that was the car involved in the accident?

A. I didn't witness the accident, so I couldn't say as to that.

Q. How soon after the date of the accident did you first see the car?

A. Possibly, probably six or seven days afterwards, something like that.

Q. Do you recall the date those photographs were taken? A. I don't remember the date, no.

Q. Did you first see the car in Tucson or in the other town? A. In Tucson.

Q. You think it was six or seven days after the accident? A. It could have been more.

Q. The only reason you rely on the belief it was the car involved in the accident was this: There was a tag on it? A. That is correct.

Q. That was the evidence in the case and your investigation, is that correct?

A. If my recollection serves me correctly, the tag said, "Schnee motor car," "Schnee accident," something of that nature.

(Testimony of John D. Caldwell.)

Q. That was so tagged at your direction, isn't that right? [240]

A. No, I didn't know it was tagged until I saw it there.

Q. In the course of your investigation you went to find out where the car was, take a look at it and take some photographs of it, is that correct?

A. That is right.

Q. Whom did you apply to for the purpose of getting to the car?

A. I just went down and looked at it.

Q. Who informed you it was there?

A. I don't recall who it was.

Q. You had some information at that time, did you not, the car had been derailed, isn't that correct?

A. I don't believe I did. I don't know whether I received any information at that time or not.

Q. Didn't you see the car after you claim you took the statement from Mr. Schnee?

A. After I took Mr. Schnee's statement I believe I did.

Q. You had some information then, didn't you?

A. After I took his statement, yes.

Q. Did you also inquire, when you went to see the car and take the photographs of it, did you inquire for the grade stake that was involved in the accident? A. I did.

Q. Of whom did you inquire?

A. I don't remember who it was. [241]

(Testimony of John D. Caldwell.)

Q. You considered that an important piece of evidence, didn't you? A. Yes.

Q. You don't know who you asked?

A. No. There were a number of people. In all probability it was the foreman.

Q. You didn't call up and say, "Here I have the motor car, but where is that stake?" A. No.

Q. Who was the foreman on the job?

A. I don't know his name.

Q. Did you make any inquiries at any time from anybody as to where the stake was, the grade stake was?

A. I believe I made an inquiry from Mr. Jacobson or Mr. Lyons, I don't know which one, and asked them.

Q. And what did you learn?

A. I learned from them it wasn't saved, it was thrown away.

Q. Who said he threw it away?

A. It was either Mr. Jacobson or Mr. Lyons.

Q. Did you write a report on that?

A. No, I didn't.

Q. You have to write a report to the claims chief, don't you, on the progress of your investigation?

A. Not until the file is complete.

Q. When the file was complete did you ever write a report [242] that one of the most valuable pieces of evidence, to wit, a surveyor's stake, wasn't available and could not be located by you?

A. I don't recall whether I included that in my

(Testimony of John D. Caldwell.)

report or not or if the report was written. I don't remember writing a report.

The Court: We will resume at 9:30 a.m., gentlemen.

(Whereupon a recess was taken at 5:00 o'clock p.m. until 9:30 o'clock a.m., March 3, 1950.)

Q. (By Mr. Gillen): Now, Mr. Caldwell, you have been transferred from the Arizona territory for the Southern Pacific up to the San Francisco territory, is that correct? A. That is correct.

Q. When did that transfer take effect?

A. March 1, 1949.

Q. March 1, 1949. And under what circumstances were you transferred out of Arizona by the Southern Pacific to the San Francisco territory?

A. Well, my superior, Mr. Lowe, the general claims agent, wanted to give me more experience, or some experience in the general office. That was the reason of the transfer.

Q. Was that the reason given you?

A. That is right.

Q. No other reason? A. No, sir.

Q. Were you brought from San Francisco to testify in this [243] case? A. That is correct.

Q. How many cases have you testified in for the Southern Pacific Company?

A. This is my first one.

Q. This is your first one?

A. This is the only one.

(Testimony of John D. Caldwell.)

Q. The only time you ever testified?

A. That is correct.

Q. Isn't it a fact you testified you were returning from Arizona to New York to testify in the case of Edward Sullivan against the Southern Pacific Company?

A. I did not testify in New York.

Q. You are sure you didn't testify in New York?

A. I am positive.

Q. You were taken from Arizona to New York to testify? A. No, sir.

Q. You didn't go to New York in the Sullivan case? A. I didn't go there to testify.

Q. And you didn't testify? A. I did not.

Q. This is the first time you have testified in any case? A. That is right.

Q. Now, I understand that while Mr. Schnee was still in the hospital under care for the various injuries that he had, [244] an automobile accident befell you and your wife, is that correct?

A. When he was in what hospital?

Q. While he was still in the hospital under care?

A. I believe that is correct.

Q. Now, as a matter of fact, so that we may have it clear in our minds, the Southern Pacific Company maintains a hospital here that primarily specializes in tubercular cases, is that right, and that is known as the Southern Pacific Sanitorium?

A. I believe they have. About half the hospital is devoted to tubercular cases and perhaps half of the hospital devoted to general patients.

(Testimony of John D. Caldwell.)

Q. Yes. And it is within your knowledge, is it not, that lack of surgical facilities and serious surgical cases are usually sent to St. Mary's Hospital, is that correct?

A. At that time I believe they didn't have a traction bed. That is the reason I was sent there.

Q. At that time they didn't have a surgery, they just had a minor surgery and dressing room, is that right?

A. I wouldn't know about that.

Q. It is within your knowledge, however, that serious surgical cases or orthopedic cases were sent to St. Mary's Hospital where they had general surgical facilities?

A. I believe that is correct. [245]

Q. And particularly orthopedic cases or bone cases?

A. Yes.

Q. You recall, do you not, that after Mr. Schnee had been in the St. Mary's Hospital for some time and had undergone several operations he was then transferred to the Southern Pacific Sanitorium, is that correct?

A. I don't know how many operations he had undergone.

Q. I didn't say——

A. You said several operations.

Q. You know he had an open reduction on his left hand and bones wired together in his left hand, metacarpal bones.

A. I did not know that.

(Testimony of John D. Caldwell.)

Q. You were investigating the case?

A. It was nearly four years ago, and I don't recall all the injuries he had at this time.

Q. You don't recall even how he looked the first time you saw him?

A. Yes, to a certain degree I do.

Q. You do recall in minute detail what he had to say to you and what you had to say to him?

A. That is correct.

Q. You do recall the first time you saw him five days after the accident he was completely free of pain and completely alert of everything?

A. That is correct, because I make it a point when I take [246] a statement that they are alert and free from pain.

Q. Did you ever tell anybody he was still out of his head when you went out there on the 3rd of September, 1946? A. Positively not.

Q. You are sure of that? A. I am.

Q. Did you see any other railroad man who was in the hospital at that time?

A. In the St. Mary's Hospital?

Q. Yes. A. I don't recall seeing anyone.

Q. Now think? A. What day?

Q. September 3, 1946, did you see any other railroad man who was then in the hospital?

A. I don't recall seeing any railroad man.

Q. Did you see any other railroad man to whom you confided you had a man all smashed up and you stated was still out of his head? A. I did not.

(Testimony of John D. Caldwell.)

Q. Referring to the Plaintiff Schnee; you don't recall that? A. I said I didn't.

Q. You don't recall you saw another railroad man there that day? A. Yes. [247]

Q. Isn't it a fact that it came to your attention Schnee had one operation there consisting of the open reduction of the fractures of the left hand?

A. I said I didn't recall that he had that.

Q. Isn't it within your knowledge, within a month after he was in the hospital, during September he had another operation consisting of an open reduction of the fracture of the patella?

A. I remember that, sir.

Q. Where the lower part of the patella was cut out and the fascia and tendons sewn to the top part of the patella?

A. I believe he was still recovering from that when I was a patient in the hospital.

Q. Isn't it within your knowledge there were also surgical procedures used on the open wound in his ankle and compound comminuted fractures of the ankle of the right foot? A. Yes, sir.

Q. Isn't it within your knowledge that his scalp was sutured in a number of places where it had been laid open to expose the skull?

A. As I recall, his scalp, his hair was shaved and bandaged. I don't recall.

Q. You remember he had a bandage on now, do you?

A. I believe it was shaved and my recollection is there being a bandage. [248]

(Testimony of John D. Caldwell.)

Q. What refreshed your recollection since yesterday that he had a bandage?

A. I believe yesterday didn't I say he had a bandage on?

Q. No, you didn't. You said he had a bandage on his knee yesterday and you recalled his head was shaved.

A. And he had a bandage on.

Q. You did not recall he had a cast on his hand and a bandage on his knee.

Mr. Thompson: I submit that is improper cross-examination, argumentative.

Mr. Gillen: Perhaps. I was asking the witness if he didn't testify to that?

Q. Let me ask you, after this procedure had been gone through with on Mr. Schnee and after about six weeks or two months if he wasn't transferred from St. Mary's Hospital to the Southern Pacific Hospital and shortly after he was transferred, the accident befell you and you went to St. Mary's and occupied, by coincidence, the same bed Schnee had been in.

A. I know I occupied the same bed he had occupied. I don't recall when he left the St. Mary's Hospital.

Q. Isn't it within your knowledge that one week after he was transferred to the Southern Pacific Hospital that because of his condition he was transferred back to St. Mary's Hospital while you were a patient there? [249]

(Testimony of John D. Caldwell.)

A. He was transferred back there, I know that.

Q. It is within your knowledge, is it not, that certain surgical procedure was undergone there?

A. I believe that is correct.

Q. Then after some considerable period of time had passed he was well enough to visit you in your room, isn't that so?

A. Yes, also my wife, who was also a patient in the hospital as a result of this accident.

Q. Yes, I understand that it is a fact also, is it not, that Mrs. Schnee visited her husband daily and she did various errands for you and your wife while you were in the hospital?

A. I don't believe she did, no, sir.

Q. You don't believe she did?

A. I don't recall of any. It has been nearly four years ago. She may have made a telephone call.

Q. Do you remember her going out and making minor purchases for you and your wife?

A. I don't recall.

Q. Do you remember her delivering messages back and forth between you when you were in different parts of the hospital?

A. I believe she did that.

Q. Do you remember her attending personal matters for you about your home?

A. No, I don't recall that. [250]

Q. As to your testimony yesterday, although the statement that you say you obtained from Mr. Schnee on September 3, 1946, was comparatively

(Testimony of John D. Caldwell.)

short and although you found Mr. Sehnee completely alert to everything going on about him, entirely rational and completely free from pain, it took you from an hour to an hour and a quarter to obtain the information from him to put into the statement?

A. Well, to write it down, also obtain the information and write the information down took about an hour to an hour and a quarter.

Q. Did you find Mr. Sehnee able to relate without difficulty from beginning to end what he knew about the accident?

A. There were some points I asked him and that I took down and I wrote those down when he gave them to me.

Q. You spoke yesterday of numerous alterations and amendments made.

A. I didn't say that, sir.

Q. Sir?

A. I don't believe I said that.

Q. If you challenge me on it we will have the record read with his Honor's permission, but I recall it. Let me, if I can, refresh your recollection. I recall you said to begin with you weren't the best writer in the world, that your writing was difficult to understand or to read, that your wife was one of the people who could read your writing— [251] you might put me down as another person that can read your writing; in addition to your poor writing there were many amendments and corrections and that in order to facilitate the reading of it and in

(Testimony of John D. Caldwell.)

order to get a second copy of it, that you had your wife type it off.

A. I believe my testimony was oftentimes when making statements there are changes and corrections and the last question you asked me was at this time, at the time you took Mr. Schnee's statement did you change his statement; my answer was I don't remember of any.

Q. Is that your answer now, you don't remember?

A. Whether I don't remember if there were any at that time.

Q. If you stated yesterday in your testimony there were so many corrections and amendments you were mistaken about that, or you intended it in a general way you encountered those difficulties in taking statements in general?

A. Yes, statements in general.

Q. Now, Mr. Caldwell, what injuries did you receive in your accident?

A. I had a laceration over one eye, had a fractured hip and a fractured pelvis bone.

Q. Were you in extreme pain? A. No, sir.

Q. For how many days after the accident do you recall you were in extreme pain? [252]

A. I don't recall I was in extreme pain. I was very nervous for the first few days. I was quite nervous, I mean irritable, lying in bed. As soon as I got over that I wasn't in any pain to speak of at all. The only pain I had was I had some slight

(Testimony of John D. Caldwell.)

cramping after about a month in the opposite leg with the muscles in my calf through disuse, but not the place it was injured.

Q. That injury has left you with a slight limp?

A. No, sir.

Q. You had a limp for some period of time?

A. Yes, before the accident.

Q. Before the accident you had a limp?

A. Yes.

Q. I see. After you had your hip broken that straightened that out?

A. No, the limp was just the same. The limp was the same after the accident as before.

Q. Did your nerves make you moan and cry out as though in pain?

A. Yes. Not cry out. I remember my wife, before she passed out she came up to see me on Sunday following the accident; I told her I was very restless and nervous.

The Court: We don't want to hear all that. We are not trying his case, Mr. Gillen.

Mr. Gillen: I understand. [253]

The Court: Answer "yes" or "no," did you moan and cry out? A. No, sir.

Q. (By Mr. Gillen): You did not?

A. No.

Q. Are you telling us now, though, you received a fractured pelvis and hip and you never experienced any severe pain?

Mr. Thompson: I object to that on the ground it has been asked and answered.

(Testimony of John D. Caldwell.)

The Court: Answer once more.

A. Yes, I had some pain.

Q. Isn't it a fact that you were given morphine and other narcotics to allay your pain during the time that you were in the hospital?

A. Not that I know of, sir.

Q. Not that you know of? A. No, sir.

Q. Did you ever complain of pain and ask for relief while you were in the hospital?

A. Not pain. As I said before, I said I was very nervous the first couple of days.

Q. You were in a cast, were you not?

A. No, sir.

Q. No cast? A. No, sir. [254]

Mr. Gillen: I think that is all of this witness, Your Honor.

Redirect Examination

By Mr. Thompson:

Q. Going back to your testimony yesterday, Mr. Caldwell, I believe I asked you, or counsel for the plaintiff asked you about this stick or stake that is referred to, been referred to in this case, and plaintiff's statement. Do you know what became of that?

A. Not from my own personal knowledge, I don't.

Q. Did you ever make any investigation to attempt to find it? A. I went and inquired.

The Court: Just answer "yes" or "no." Did you make any investigation?

(Testimony of John D. Caldwell.)

The Witness: Yes.

Q. (By Mr. Thompson): Were you able to find it? A. I was not.

Mr. Thompson: That is all.

Mr. Gillen: No further questions.

M. O. WALLACE

having been previously sworn, was recalled and testified as follows:

Direct Examination

By Mr. Thompson: [255]

Q. Mr. Wallace, you have been sworn and previously testified in this case? A. Yes, sir.

Q. Calling your attention now, Mr. Wallace, to the document you have in your hand, will you turn it over and tell me is that marked Exhibit F for identification? A. Yes, sir.

Q. Now, with respect to Defendant's Exhibit F for identification will you examine that document and tell me whether or not that is your signature that appears on that document? A. Yes, sir.

Q. And when and where did you sign that document, Mr. Wallace?

A. Out at St. Mary's Hospital.

Q. And the signature of Adolph J. Schnee, who signed that, Mr. Wallace, if you know?

A. Mr. Schnee.

Q. Was it signed in your presence?

A. Yes, sir.

(Testimony of M. O. Wallace.)

Q. What was the date you signed it, do you recall? A. August 30th, 1946.

Q. Did he sign it at the same time or approximately at the same time you signed it, Mr. Schnee I mean?

A. He signed it and I witnessed his signature.

Q. Were you at St. Mary's Hospital for the express purpose [256] of seeing Mr. Schnee?

A. Yes, sir.

Q. And for the purpose of taking a statement from him if possible? A. Yes, sir.

Q. And will you tell the Jury just what transpired there at that time, as you recall it, Mr. Wallace, in connection with your visit to Mr. Schnee. What was said by you, what was said by him? Just detail the account of your visit.

A. I was instructed to get a statement from Mr. Schnee. I said, "Well, I will have——"

Q. But tell what happened, don't remark about what you stated, just what happened at the hospital.

A. After I got to the hospital?

Q. That is right.

A. I carried on a conversation with him for quite a little while about his injuries.

The Court: What time of day was it?

A. Some time in the afternoon. It was during the visiting hours, in the afternoon visiting hours.

The Court: All right. Go on and tell what happened.

Mr. Gillen: Now, may it please the Court, if in

(Testimony of M. O. Wallace.)

telling what happened the witness will undertake to relate what is contained in the statement, I would ask the Court to afford me an opportunity to examine him on voir dire. [257]

The Court: Tell how you got the statement before you tell anything that is in it.

The Witness: Well, I told Mr. Schnee what I was there for and asked him if he felt like giving me a statement, and he said yes. I told him I would like to fix up the accident report, so I put the papers together and I started in to question him and I would write down as he would answer the question.

The Court: Go ahead and examine him if you wish.

Mr. Gillen: Thank you, Your Honor.

Q. Now, Mr. Wallace, when you went into the hospital it was August 30th you remember distinctly?

A. I remember it was the day after the accident.

Q. All right. Did you encounter anybody in authority, any person connected with the hospital to get permission to go to Mr. Schnee's room?

A. Yes, sir.

Q. Who? A. A nurse.

Q. Where did you find the nurse?

A. I found her at her desk out in the hall.

Q. On the first floor?

A. I couldn't tell you what floor it was.

Q. At the entrance of the hospital?

A. No, it was the floor that he was on. [258]

(Testimony of M. O. Wallace.)

Q. How did you find your way to the place?

A. I inquired in the office.

Q. From whom did you inquire? At the desk?

A. At the desk?

Q. Yes.

A. I don't know. It was one of the nuns there, I couldn't say.

Q. And she directed you to the place?

A. She said he was at place so and so. I don't remember the room.

Q. Then you went up and encountered his nurse?

A. The nurse was at her desk or table, so I asked her, I said, "Will it be okay for me to talk to Mr. Schnee?" She said, "Yes, it is."

Q. Did you ask her anything about whether Mr. Schnee was under any opiates or anything at the time?

A. No, sir—may I go back a little further?

Q. Surely, if you have an explanation or something.

A. Before I went to the hospital I called the doctor and asked him if it was okay to get a statement from Mr. Schnee; he said yes.

Q. Which doctor was that?

A. I can't recall.

Q. You know Dr. Francis was the surgeon in charge of his case, don't you? [259]

A. No, I don't.

Q. Did you know Dr. Francis, from the time Mr. Schnee was received in the hospital the night before,

(Testimony of M. O. Wallace.)

which was approximately eight o'clock at night, Dr. Francis had operated on him until half past one that morning, the morning of August 30th, 1946?

A. I didn't know that?

Q. What time of the day did you call the doctor?

A. It was sometime during the day before I went over there.

Q. And can you tell us any better than you told his Honor when he asked the question, what time of day it was when you got to the hospital?

A. Well, it was shortly after two o'clock. It was sometime during the visiting hours.

Q. Do you know what the visiting hours at St. Mary's Hospital are, what they were at that time?

A. As I remember, it was two o'clock.

Q. Two o'clock?

A. Yes, as I remember it.

Q. Until what time?

A. Well, I don't know.

Q. You don't know. Now, when you got into the hospital room where Schnee was, can you describe the room for us? A. No, sir, I can't.

Q. Can you describe if there was more than one bed? [260]

A. There was one bed.

Q. Can you describe if there was more than one patient in the room?

A. There was one patient.

Q. And that patient was Mr. Schnee?

A. Yes, sir.

(Testimony of M. O. Wallace.)

Q. Now, can you describe the appearance of Mr. Schnee when you got in there?

A. When I came in the door I saw his eyes were closed; I thought, well, he is asleep.

Q. What is it?

A. I thought he was asleep. His eyes were closed, so I turned to go out. As I did he called to me and says, "Hello, Mr. Wallace," so I turned back then and talked to him for quite a little while.

Q. Can you tell us something about his appearance, what you observed about him?

A. Well, he was pretty well bandaged up, lots of bandages.

Q. Where?

A. On his head and arms and later on he showed me on his legs and around.

Q. What did he show on his legs?

A. Just showed me where he was bandaged up, showed me his ankle or foot, I don't know just exactly which.

Q. How did he show it to you? Did he lift his leg up? [261]

A. No, raised the cover over to the side.

Q. You observed bandages?

A. He had bandages on, yes.

Q. Gauze bandages?

A. I presume they were.

Q. With adhesive tape on?

A. I believe they were.

Q. Do you know what a leg cast looks like, a plaster of Paris leg cast?

(Testimony of M. O. Wallace.)

A. There were no casts.

Q. You are positive of that?

A. I am pretty sure.

Mr. Gillen: I wonder, if it please the Court, if I might see the exhibit that was identified yesterday by the attendant from St. Mary's Hospital, the medical attendant?

Mr. Henderson: I believe this is voir dire, Your Honor, not cross-examination.

The Court: Give him the exhibit, Clerk.

Q. (By Mr. Gillen): Mr. Wallace, if the records of the hospital showed, at St. Mary's Hospital showed that there was a cast on the left hand and a cast with a pressure pad on the right leg and a cast on the left leg, would that refresh your recollection as to what you saw?

Mr. Henderson: We would like to make an objection that it is improper voir dire and unsuitable matter, not matter [262] that is proper and relevant at this time; reading hospital records not in evidence.

The Court: Objection overruled.

A. I don't recall seeing the cast.

Q. (By Mr. Gillen): You don't recall?

A. All I know, it was all covered with bandages.

Q. What about his head?

A. The head was bandaged up.

Q. You remember that distinctly? A. Yes.

Q. As a matter of fact, if you were there on August 30th, 1946, you know, don't you, that the man was in an oxygen tent?

(Testimony of M. O. Wallace.)

Mr. Henderson: We object to it as argumentative if you were there you know certain things.

The Court: Answer. Was he in an oxygen tent?

A. He wasn't in an oxygen tank when I was there.

The Court: Tent. A. Tent.

Q. (By Mr. Gillen): Do you know what an oxygen tent looks like?

A. I have seen them, yes.

Q. Did you see any oxygen equipment in the room when you were there that day?

A. I believe there was some.

Q. Describe what you saw. [263]

A. There was a tank.

Q. What kind of a tank?

A. A long cylinder with green paint on it.

Q. All right, anything else?

A. I don't remember seeing anything else. The fact of the matter, I wasn't interested in those things. They were just there and I noticed them. I didn't make any mental reservations on those things.

Q. Didn't make any mental reservations?

A. On the appearance of the room, the bed, anything like that. It is just like I would come into anybody's home, I come in to visit with them. I wasn't examining the room.

Q. You were interested in the boy's condition, whether or not he was in any physical and mental shape to give a statement?

(Testimony of M. O. Wallace.)

A. That was what I was interested in.

Q. Was anybody present besides you and Mr. Schnee when he gave you the statement?

A. Nobody present.

Q. At the bottom of that statement there was a typewritten portion written irregularly and at the very bottom of the page and surrounding what purports to be the signature of Mr. Schnee—I believe Mr. Schnee has identified it as looking very much like his signature and we are not disputing it. When was that typewritten portion put in?

A. That was put in at the superintendent's office. [264]

Q. When? A. The same day.

Q. After you brought it back? A. Yes, sir.

Q. Sir? A. Yes, sir.

Q. So the document was added to after you obtained the purported signature of Schnee, is that correct? A. Yes, sir.

Q. Now, Mr. Wallace, did you ever teach Mr. Schnee anything about building batteries?

The Court: Now——

Mr. Gillen: I beg your pardon. I am losing sight of the fact that I am on voir dire.

I think I should perhaps make the observation to your Honor I believe the voir dire has indicated that the document was altered after the signature of the plaintiff was supposed to have been obtained.

Q. (By Mr. Thompson): Mr. Wallace, what if anything was written on the statement at the time Mr. Schnee signed it?

(Testimony of M. O. Wallace.)

A. You want me to read that?

Q. Yes, read the part that is there.

A. "I have read and understand the foregoing statement and it is true and correct to the best of my knowledge and belief."

Q. Everything else on the statement there was put there before [265] Mr. Schnee signed it, is that correct?

A. Everything but this on the back.

Q. Whose handwriting is the document here where it is handwritten?

A. This is typewritten.

Q. In whose handwriting is the body of the instrument filled in? A. Mine.

Q. And whose signatures did you say appeared on there?

Mr. Gillen: That has been asked and answered.

Q. Did you at any time read what was written there to Mr. Schnee or did he read it?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial. After he is supposed to have obtained the signature he went back and somebody wrote in that Schnee had read it and everything there was true.

Q. (By Mr. Thompson): Will you answer the question?

A. I gave it to him to read.

Q. Did he look at it and examine it?

A. He read it through thoroughly.

Mr. Gillen: I move it be stricken. Nobody can

(Testimony of M. O. Wallace.)

tell whether anybody reads anything. All they can say is that the person looked at the document.

The Court: Motion denied.

Q. (By Mr. Thompson): Did Mr. Schnee, after he had [266] examined the document and before or at the time he signed it make any other comment about the document? A. No, sir.

Mr. Gillen: Just a moment. I object to any comment attributed to Mr. Schnee upon the basis of the request I made of your Honor yesterday that we be afforded an opportunity before your Honor rules on any comments of any alleged statement of Schnee, orally or otherwise, to present some evidence as to his condition.

The Court: Objection overruled. Proceed.

Q. (By Mr. Thompson): Would you answer the question? A. No.

Mr. Thompson: At this time we offer Defendant's Exhibit F, except that part of it the witness says was typewritten after the signing; the Jury be instructed to disregard that.

Mr. Gillen: Your Honor, I see no reason for the offer at this time in view of your Honor's previous announcement to counsel that you would reserve your ruling.

The Court: I am ready for you to be heard now. You want to be heard further?

Mr. Gillen: I would like to produce some witnesses as to the man's condition as part of the voir dire.

(Testimony of M. O. Wallace.)

The Court: No, the request is denied. The exhibit is admitted. The Clerk is instructed to obliterate the part [267] referred to.

Mr. Gillen: May I say something, Your Honor?

The Court: Yes.

Mr. Gillen: If it is admitted it can be shown to the Jury; if it can be shown to the Jury the only thing I can do with any later testimony, if it please the Court, is possibly deduct from it, and if your Honor was afforded the opportunity of availing himself of hearing the testimony relevant to the man's condition it might affect your Honor's ruling or it might influence your Honor's ruling. I respectfully request the Court to let me produce those witnesses.

The Court: I am willing that you should do that when your turn comes. In the meanwhile the exhibit will not be exhibited to the Jury. It is admitted now.

(Defendant's Exhibit F in evidence.)

Q. (By Mr. Thompson): At any later time after you took that statement did you see Mr. Schnee?

A. Yes, I saw him several times.

Q. And where did you see him?

A. At St. Mary's Hospital.

Q. And what was the purpose of those later visits, Mr. Wallace?

Mr. Gillen: Objected to as calling for a self-serving statement. [268]

The Court: He may answer.

(Testimony of M. O. Wallace.)

Q. (By Mr. Thompson): What was the purpose of your later visits?

A. I just went out to see how he was getting along. I felt I should call on him once in a while.

Mr. Thompson: That is all.

The Court: Cross-examine, Mr. Gillen.

Mr. Gillen: No further examination. I beg your pardon, I would like to ask a question on another topic of cross-examination.

Re Cross-Examination

By Mr. Gillen:

Q. Mr. Wallace, did you teach Mr. Schnee anything about building batteries? A. Yes.

Q. When?

A. It was when he went on this district at Willcox.

Q. That was the occasion when your relief man failed to appear on the job, went off the job and you picked Schnee up hurriedly and had him get his clothes together and go on the train with you to Willcox? A. Yes, sir.

Q. As I understood your testimony or recollect your testimony given here on direct examination, you remained with him, you talked with him about the work on the way on the [269] train from Tucson to Willcox? A. Yes, sir.

Q. As I understand, you spent part of one day and part of another day with him at Willcox?

(Testimony of M. O. Wallace.)

A. I spent one full day and part of two days.

Q. Part of a second?

A. And part of a third.

Q. All right, when was it you taught him to build a battery?

A. That was the first and the second day.

Q. Sir? A. The first and the second days.

Q. Did you actually build a battery with him?

A. Yes.

Q. Where was that done?

A. The first one was at the east end of Hado.

Q. You were out on the car with him, is that correct?

A. Yes. I went out to familiarize him with the district and we discovered these batteries that this man ahead of him had neglected. They were right on the verge of failing. We had to get battery material to refill them.

Q. Did you have any equipment along?

A. We had everything to build batteries with, yes.

Q. What all did you have to build batteries with?

A. The elements, the battery elements, water and tools that he had used in doing the work. [270]

Q. And what else?

A. Well, we had the motor car.

Q. What else to build batteries?

A. What?

Q. What else to build batteries?

A. He had a pair of pliers and a paddle to stir the solution.

(Testimony of M. O. Wallace.)

Q. What kind of a paddle?

A. Well, usually use a board.

Q. What kind did you have that day?

A. The board off of a box.

Q. Had the board off of a box; can you tell us what shape it was?

A. I should judge it was between 28 and 30 inches long. That one end was cut down with a knife to sort of make a handle.

Q. When you say the board off a box, what do you mean by that? Do you mean the type of light wood found on the side of, say, an orange crate or apple box?

A. About three-eighths of an inch thick and I judge three inches wide.

Q. And whittled down to make a handle to hold on to? A. Yes, sir.

Q. Did you also instruct him on how to wrap that up in something after it had been in the caustic so it wouldn't [271] get in the other materials?

A. No, sir.

Q. That was the practice, wasn't it, when building the batteries, and the light wooden paddle was saturated with the caustic solution you wouldn't lay it down, you would wrap it up in newspaper, isn't that correct? A. No, we never did that.

Q. You never did that. I think that is all.

MRS. MARY JO RUSSELL STEVENS

called as witness by the defendant, having been first duly sworn to state the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. Please state your name?

A. Mrs. Mary Jo Russell Stevens.

Q. Where do you reside?

A. 1006 East Alta Vista.

Q. In Tucson, Arizona?

A. In Tucson, Arizona.

Q. How long have you resided in Tucson, Mrs. Stevens? A. Just about four years.

Q. And what is your profession?

A. I am a registered nurse.

Q. Where were you working in August of 1946, Mrs. Stevens? [272]

A. St. Mary's Hospital.

Q. What position did you occupy in St Mary's Hospital in the latter part of August, 1946, and the early part of September, 1946?

A. I was a supervisor on the orthopedic floor.

Q. At St. Mary's Hospital? A. Yes.

Q. I will ask you, Mrs. Stevens, if you are acquainted with the plaintiff, Mr. Schnee, if you ever saw this young man before?

A. I don't recognize him to look at.

Mr. Gillen: What was that answer? I don't recognize him——

(Testimony of Mrs. Mary Jo Russell Stevens.)

The Court: To look at, yes.

Q. (By Mr. Thompson): Were you working there in the hospital? Do you know whether or not in September, early in September, 1946?

A. Was I working there?

Q. Yes, as supervisor? A. Yes.

Q. By referring to your records, the records of the hospital, could you tell whether or not there was a patient named Adolph J. Schnee in the hospital at that time? A. Yes.

Q. And do you recall the name, aside from the individual [273] do you recall the name Schnee at this time? A. Yes, I do, I remember it.

Q. Can you recall, what was the patient suffering from, Schnee, at that time?

Mr. Gillen: We will stipulate to all those things, what he was suffering from. We don't need to waste time on that.

Q. (By Mr. Thompson): Do you recall whether or not in his treatment it was necessary for the patient to be bandaged at that time? A. Yes.

Q. When you saw him during that period do you recall whether or not he always had some bandages on?

Mr. Gillen: Just a moment, the question is leading, suggestive, assuming. The witness has no recollection of recognizing the patient.

The Court: Frame it a little differently. Just ask her what she remembers about the case.

Mr. Thompson: Yes.

Q. What do you recall about the Schnee case at this time?

(Testimony of Mrs. Mary Jo Russell Stevens.)

A. I remember the patient. I remember the instance. I remember part of his injuries. I remember what room he was in. I remember taking care of him as a supervisor.

Q. Could you tell the Jury what his appearance was on those occasions when you saw him, as to the treatment he was receiving, if any? [274]

Mr. Gillen: Just a moment. I submit the record would be the best evidence of the treatment and the record is here before the Court.

The Court: She may testify.

A. I know he was in a fracture bed because he had fractures. He was well bandaged, various limbs where he had been injured.

Q. (By Mr. Thompson): Do you recall whether or not he was in the hospital for some time while you were there?

A. Yes, he was. I think I left before he did, if I remember correctly.

Q. And your name at that time, Mrs. Stevens, was Stevens?

A. No, Mary Jo Russell. I have been married since.

Mr. Gillen: What is that, please?

Mr. Thompson: Exhibit G.

Q. Will you look at the bottom of that Defendant's Exhibit G for identification and tell me whether or not your signature appears on that document?

A. Yes, it does, in two places.

Q. You say in two places; you mean on each page?

A. Yes.

(Testimony of Mrs. Mary Jo Russell Stevens.)

Q. On the first and second page of the exhibit. Do you recall at this time, Mrs. Stevens, having signed that document? A. Yes, I do.

Q. And do you recall the circumstances under which you [275] signed it?

A. Yes. Ordinarily we don't sign things like this. I can't remember having signed any other ever. We usually find a witness for them. I did sign this one, I witnessed it. It was read to me in the presence of the patient. He signed it and I signed it and this other gentleman signed it.

Q. The other signatures appearing on there were signed at the same time you signed it?

A. They were put on at the same time mine was.

Q. Do you recall what was the condition of the patient at that time, were you talking to him or was he talked to in your presence? A. Yes.

Q. Describe his condition generally at that time as far as his conversation with you or with anyone in your presence.

A. I can't necessarily describe the conversation. I don't recall it word for word or even probably the body of it, with the exception it was about this.

Q. Was any conversation held with the patient while you were present?

A. You mean did the patient and I converse?

Q. Yes.

A. Yes, I believe all three of us did. I can't tell you what about. [276]

Q. Do you know whether or not at that time

(Testimony of Mrs. Mary Jo Russell Stevens.)

there had been any opiates administered to him recently, do you know?

A. Well, as I know I checked to see and was under the impression at that time he had not, and I know now he hadn't. It was nine o'clock the night before that he had a narcotic for rest that night, but he had had nothing since the night before.

Mr. Thompson: I think that is all.

Cross-Examination

By Mr. Gillen:

Q. What time of day was this statement taken?

A. It was approximately after lunchtime, which would be eleven-thirty or twelve o'clock, between then and one-thirty or two, somewhere in that period.

Q. Now, how do you recall that the patient hadn't had any narcotic since the night before this date at nine o'clock?

A. At the time when we were asked to witness this or at the time I was asked to witness it, I was asked to check the chart to make sure he had none before he was asked to sign it. As I understand, it is customary, they don't if they have had anything.

Q. All right. And how do you recall you had checked the chart and found he didn't have any before the night before?

A. I am going on the original—I went on the assumption I had checked it without remembering it. [277]

(Testimony of Mrs. Mary Jo Russell Stevens.)

Mr. Gillen: Then I move it all be stricken out because the witness is going on an assumption.

The Court: Motion denied.

Q. (By Mr. Gillen): You mean to say now you are just assuming you did certain things. You have no memory of doing certain things?

A. I have no memory of going out and checking that chart. I have seen it since and I know it was that late.

Q. When did you see it?

A. I saw it yesterday.

Q. You saw it yesterday? A. Yes.

Q. What time yesterday?

A. Some time yesterday morning.

Q. What is it?

A. No, it was yesterday afternoon.

Q. Where did you see it yesterday afternoon?

A. Here in the Post Office Building.

Q. Who showed it to you?

A. I don't know who the lady was.

Q. What is it?

A. I don't know who the clerk was or lady that showed it to me.

Q. Where in the Post Office Building?

A. It was on the fourth floor. [278]

Q. On the fourth floor of this building?

A. Yes.

Q. Do you know the room number or what room it was? A. No, I don't.

Q. Who took you there?

(Testimony of Mrs. Mary Jo Russell Stevens.)

A. Mr. Thompson took me there.

Q. Mr. Thompson took you there, I see. You looked at the exhibit to refresh your recollection?

A. Yes, I did.

Q. Now, do you have any recollection or did you refresh your recollection about how long this man was in an oxygen tent?

A. The only thing I wanted to see on the chart was to be sure of my memory in regard to how long it had been before he signed the paper that he had had a narcotic. I wasn't sure of the time element, that was the only thing I looked at.

Q. Did he have any other type of sedative?

A. No, he didn't.

Q. He had no type of sedative, is that correct?

A. To my knowledge all he had was the morphine, grains one-quarter, at nine p.m. or 9:15 the night before. He had nothing during the rest of the night or that day until bedtime and he had a sleeping capsule. He wasn't under narcotics except for rest and occasional pain at that time. [279] My own writing is on the chart.

Q. Mrs. Stevens, you were the supervisor of nurses in the particular section, the orthopedic department, is that correct? A. That is right.

Q. Your duties didn't bring you generally in direct contact with the patients, the nurses handled the patients and you superintended the handling of the patients?

(Testimony of Mrs. Mary Jo Russell Stevens.)

A. No, that is not true. I had direct contact with each patient.

Q. You actually had contact with all of the patients?

A. I did all their treatments and medications, most of their treatments and most of their medications, not all of them, no.

Q. Mrs. Ramirez, was she a supervisor at that time?

A. I don't remember that she was. I don't know.

Q. I note she gives quite a bit of medication. Miss B. Anders, was she a supervisor?

A. Not to my knowledge.

Q. Was Miss Burke a supervisor? A. No.

Q. Was Miss Courtney a supervisor?

A. No.

Q. Was Miss Anders a supervisor? A. No.

Q. Was Miss Gray a supervisor? [280]

A. No.

Q. Was Miss Jimenez a supervisor?

A. No. Most of those were student nurses.

Q. What is 100,000 units of penicillin considered, is that considered a treatment or what is it considered? A. It is considered a treatment.

Q. I note in the chart there are quite a number of treatments of penicillin, injections of penicillin, 100,000 units at a time given by the young ladies whom you have identified as student nurses?

A. Yes.

Q. I note also narcotics administered by those same young ladies, would that be so? A. Yes.

(Testimony of Mrs. Mary Jo Russell Stevens.)

Q. And your name was Russell at that time, is that correct? A. Yes.

Q. I don't find any record of you giving any treatment in this case. Your name would be there if you had given the treatment?

A. Not necessarily. We don't have to sign our name to treatments; a medication and narcotics, yes.

Q. Not penicillin?

A. Not always, sometimes with student nurses, yes.

Q. I notice page after page of penicillin, up to eighteen million, two hundred thousand and eighty units, all [281] signed with one exception by nurses who administered them. Does that refresh your recollection on whether the nurses signed for giving penicillin?

A. As a rule they do, but it isn't a necessity, is the only way I can put it.

Q. It isn't a necessity? A. No.

Q. As I recall your testimony, Mrs. Stevens, you don't have any distinct recollection of Mr. Schnee personally?

A. He looks a little differently than he did then.

Q. Do you recognize him at all?

A. Vaguely.

Q. I understood you to say this morning that you didn't recognize him by looking at him?

A. That is very true. It is a very vague recollection. It is a recollection of bandages and a cast and fracture bed more than it is the individual.

Q. The recollection you had at being present at

(Testimony of Mrs. Mary Jo Russell Stevens.)

the signing of the paper that was shown you was that it was sometime in the afternoon?

A. That is the way I remember it, probably after lunch.

Q. How do you place that?

A. Because of the fact that we were probably busy in the morning; then, too, during rest hours we usually don't disturb patients. I went off duty, at that time I was working [282] until four. It would have been somewhere around lunchtime, the morning, I had been busy at that time making rounds with the doctors.

Q. That is the only way you can place it?

A. I am not definite on the time element, no.

Q. If you went off duty at four o'clock what time did you go on? A. Eight o'clock.

Q. Eight o'clock in the morning; so you would be on between say ten and twelve on that day, would you not? A. Yes.

Q. And the visiting hours at the hospital are when? A. Three to four and seven to eight.

Q. Would it have come to your attention that a patient with the injuries, extensive injuries that the patient Schnee was suffering at that time, had had a visitor with him from an hour to an hour and a quarter in the forenoon, around eleven o'clock in the morning?

A. You mean did I see the visitor?

Q. Would such a thing come to your attention as supervisor of the orthopedic department?

A. It could, yes.

(Testimony of Mrs. Mary Jo Russell Stevens.)

Q. Could a patient so badly injured as that have a visitor from an hour to an hour and a quarter around eleven o'clock in the morning, between eleven and twelve, say, without it [283] coming to your attention as the supervisor who has direct contact with each patient as you said?

A. I would say no, because they would have to come and ask me, either me or my assistant.

Q. The chart notes when you have a visitor, does it not?

A. Sometimes, yes. Those are not important elements on any chart.

Q. Is it the rule of the hospital the chart notes when you have visitors? A. No.

Q. Do you require your student nurses to chart visiting? A. Not necessarily, no.

Q. Now, when the visit is in irregular hours is it noted? A. Not always, no.

Q. Visitors are not considered part of the patient's care or what happens to them? Keeping away visitors from very sick or injured people is considered part of the patient's care, is it not?

A. Yes, it is.

Q. The recollection you have of your participation in this preparation of this paper is what?

A. I remember being asked to come in and witness a patient's signature. Then the article was read to the patient in front of me and he signed it and I signed it.

Q. Did you read the article? [284]

A. It was read to me. I read it indirectly, I mean

(Testimony of Mrs. Mary Jo Russell Stevens.)

over the man's shoulder, but I didn't read it myself. It was read to the patient aloud.

Q. Do you remember who the man was?

A. Yes, Mr. Caldwell.

Q. You later became very well acquainted with Mr. Caldwell?

A. No, I have not seen him since, until yesterday.

Q. After that he became a patient of your hospital?

A. I later left. I became a nurse away from St. Mary's.

Q. You later heard Mr. Caldwell was in the hospital?

A. Not necessarily, no.

Q. You say you left shortly after that?

A. I said I left shortly after Mr. Schnee. I did not know Mr. Caldwell when he was a patient, to my knowledge.

Q. Was the paper all prepared?

A. Just as it is now.

Q. That is your best recollection?

A. Yes.

Q. Who signed first?

A. The patient, I assume. I can't swear to it, but I don't sign something until someone else signs it when I am a witness.

Q. I am asking you what you did, not what you would naturally do. I am asking you for your memory. Do you remember who signed it first?

A. No, I don't exactly.

Q. As between you and Mr. Caldwell, do you re-

(Testimony of Mrs. Mary Jo Russell Stevens.)

member who signed first? A. No, I don't.

Q. The paper was ready? A. Yes.

Q. Were you there at any interview had between Mr. Caldwell and the patient Schnee when Mr. Caldwell was purportedly obtaining the information put in that paper?

A. I don't believe so, no.

Q. All you were asked to do was go in and sign?

A. Witness the patient's signature.

Q. Do you have any recollection of being asked by Mr. Caldwell that morning, a matter of from one to two hours or more prior to the time you were requested to come in and witness the signature, whether or not Mr. Schnee, the patient, had had any narcotics or sedatives? A. Yes, I was.

Q. When?

A. Sometime that morning before I was asked to witness this. I have no time element I can put that accurately on.

Q. All right. Who asked you?

A. Mr. Caldwell asked me.

Q. You have a distinct recollection of Mr. Caldwell going in and asking you that in the morning prior to this? [286]

A. Yes. He told me he had Dr. Francis' permission to see the patient.

Q. You remember that distinctly? A. Yes.

Q. I thought you said you weren't aware of the fact that there had been a visitor in Mr. Schnee's room?

(Testimony of Mrs. Mary Jo Russell Stevens.)

A. I said I wasn't always aware of visitors.

Q. You did say you weren't aware of the fact that there was a visitor in that morning and you didn't think a visitor could be there on that morning an hour to an hour and a quarter in the forenoon without you knowing about it.

A. Ordinarily I would know they were there, yes.

Q. What did you know about it this morning?

A. You mean whether I actually knew whether he was there, I remember or not?

Q. Is it your testimony now that you remember that Mr. Caldwell was with that patient that morning from an hour to an hour and a quarter?

A. I have no idea how long he was there. I know he was there.

Q. Is it your testimony now you knew he was there at all seeing the patient that morning before you were asked to witness the signature in the afternoon?

A. I know he was in there doing something, talking to the patient; it was later I was called in. [287]

Q. Why didn't you tell us that before when you were asked about your knowledge of the visiting of the patient?

A. I am a little confused. I don't remember denying it. I know you asked me if I did know there were visitors.

Q. I am not trying to confuse you. I am trying to get at your memory of what occurred; if there is

(Testimony of Mrs. Mary Jo Russell Stevens.)

anything confusing about my question please tell me.

A. All I know is this: Mr. Caldwell came and asked me if I would check the chart to see if the patient had any narcotics at that time to interfere with his questioning; I checked the chart and told him that it was all right, and he had told me he had Dr. Francis' permission. From then on he went to the patient's room and I paid no more attention and I don't know anything about it in that interval until I was asked to come in and witness the signature. I went and witnessed it and came back. What period of time he was in there I don't know. I know the beginning and end of it; what went on in between, I don't know.

Q. You wish to correct your testimony——

Mr. Thompson: I object to that question.

The Court: Let him finish the question.

Q. (By Mr. Gillen): You wish to correct your testimony, then, given before that this patient could not have had a visitor there from an hour to an hour and a quarter without your knowing about it?

A. I didn't say that.

Mr. Thompson: I object to that on the ground it is assuming something not in evidence.

Mr. Gillen: I would be happy to have the record read.

The Court: We are not going to read the record. Answer the question if you can?

A. I don't know if I can.

Mr. Gillen: Let me put another question.

(Testimony of Mrs. Mary Jo Russell Stevens.)

Q. Is it your testimony now you did know Mr. Caldwell was in there from an hour to an hour and a quarter that morning?

A. I knew he was in there; I didn't know how long.

Q. Mrs. Stevens, are you telling us now you have a distinct recollection, as you sit there now, of the incident occurring on September 3, 1946, four years ago, of Mr. Caldwell coming to you and saying, "Is this patient capable of talking? Has he had any narcotics?" You have a distinct recollection of having gone to the chart and checking it and found the patient hadn't had any narcotics since the night before and telling him he could go in there?

Mr. Thompson: I object to that question on the ground such questions are in there and have all been asked and answered.

The Court: Answer it again.

A. Did I recall all of that?

Mr. Gillen: Would you read the question. [289]

The Court: No, don't read it.

A. Yes, I recall the instance. So far as I know this is the only legal paper I signed.

Q. This isn't about signing a legal paper, this is about checking the chart.

Mr. Thompson: If it please the Court, she is entitled to give her reasons for the recollection.

The Court: Ask the question, Mr. Gillen. One more question, ask it. Ask another question.

Mr. Gillen: Was there a ruling?

(Testimony of Mrs. Mary Jo Russell Stevens.)

The Court: Nothing to rule on. Ask another question. Finish the examination.

Q. (By Mr. Gillen): What I am trying to determine is whether or not you have remembered through the ensuing four years that in the forenoon of September 3, 1946, at the request of Mr. Caldwell you went to check a chart to see whether or not a patient named Schnee had any narcotics during the day and what his condition was, whether or not he could be visited. A. Yes.

Q. You have remembered that all this time?

A. No, I had to do a little memory recalling in the last couple of days. I had forgotten a lot of it.

Q. Somebody refreshed your memory on it?

A. No, the case was brought before me and I refreshed my [290] own memory.

Q. How, by talking to somebody?

A. I was asked if I remembered the paper, if I remember it at this time.

Q. Who asked you? A. Mr. Caldwell.

Q. When did he see you and where?

A. I saw him yesterday.

Q. He told you, did he not, that he had gone to you that morning and asked you to find out whether or not the patient had had any narcotics or sedatives and whether or not he could visit with the patient?

A. He asked me what I remembered about the case.

Q. Yes. Did you say you remembered that?

A. I remembered parts of it, yes, and the rest

(Testimony of Mrs. Mary Jo Russell Stevens.)

has come back gradually. I have tried to remember the details.

Q. Came back gradually with the help of Mr. Caldwell? A. Not necessarily, no.

Q. Whether necessarily or not, did it come back partly through the help of Mr. Caldwell?

A. Small part of it, yes.

Q. One of the small parts of it was he had asked you that morning and you had checked the record there and told him the man would be all right to talk with?

A. I remember that part myself. The only thing I wasn't [291] sure of was how long it had been since the patient had narcotics. In my mind I assumed I had given the accurate answer when I told him no. I wondered about my own judgment. Then I checked it, that is the reason I wanted to see the record again. I saw it yesterday and it was just as I thought it would be. I did have some doubts because it has been a long time.

Q. And you have seen lots of patients with fractures since then?

A. Not necessarily with fractures.

Q. Lots of patients have had sedatives and morphine? A. Absolutely.

Q. Probably thousands? A. Could be.

Q. What else did Mr. Caldwell do to refresh your recollection; on what other portions did he refresh your recollection?

A. Nothing I can think of.

(Testimony of Mrs. Mary Jo Russell Stevens.)

Q. Didn't he refresh your recollection on any part of it? A. Only through conversation.

Q. That is the way we all refresh each other's memory is through conversation. What portion of the incident did he refresh your recollection on?

A. All he did was ask me if I remembered the occasion, if I remembered all about the incident of signing my name to [292] that paper and what I recalled about it.

Q. All right. You told him what you recalled about it and you recalled it was the only paper you had signed up to that time at St. Mary's?

A. I am not saying it is the only one. I am saying I think it is the only one. I don't recall signing any others.

Q. You have forgotten if you signed others?

A. We rarely sign them.

Q. If you have signed others you now forgot what they were? A. Yes.

Q. Do you remember any other papers you have signed for patients since 1946?

A. I have signed various papers like this, but nothing like this. We have been cautioned not to.

Q. Cautioned by whom?

A. By our teachers in training, to stay out of legal involvement, don't sign things unless absolutely necessary.

Q. What was it that made you think this was absolutely necessary in this instance?

A. The only thing I can recall, as supervisor of

(Testimony of Mrs. Mary Jo Russell Stevens.)

the floor I cannot ask students, they were not permitted to; I assume there was not anyone else available.

Q. There were nuns in charge there who were your [293] supervisors?

A. I was working with a nun and at that time it happened she was the head nurse and I was supervisor.

Q. There were nuns there that had the conduct of the hospital or wards?

A. Yes, in other departments.

Q. Was there any reason why you didn't refer Mr. Caldwell to a nun?

A. None in particular, no.

Q. Is there any other reason you can think of now why this was the only paper you had signed that you can remember up to that time?

A. I don't quite get your question. You mean, am I sure I never signed any others?

Q. Is there any reason you remember that was the only paper you had signed up to that time?

A. Except I remember this explicitly, remember a large part of signing it.

Q. It is a fact, is it not, that Mr. Caldwell refreshed your recollection or called to mind he had contacted you that morning to determine——

Mr. Thompson: Just a minute——

Mr. Gillen: May I finish?—whether or not the patient had any narcotics and was in a condition mentally or physically to talk to him? [294]

(Testimony of Mrs. Mary Jo Russell Stevens.)

Mr. Thompson: I object to that on the ground it has been asked and answered.

The Court: Answer again.

A. In the course of the conversation we discussed it, yes.

The Court: Will you read the question to the lady again.

(Last question read.)

A. Well, yes, we did discuss it.

Q. And he refreshed your memory on that, and you hadn't remembered it, had you?

A. I remembered parts of it, yes.

Q. What parts did you remember and what parts did he tell you about?

Mr. Thompson: If it please the Court, that question has been asked one time.

The Court: I will give you five minutes more on this examination.

Mr. Gillen: I beg your pardon, Your Honor?

The Court: I will give you five minutes more.

Mr. Gillen: I am through then, if your Honor Honor takes that position.

The Court: Suit yourself.

Mr. Gillen: The record will bear me out that I have never had a direct answer on this particular phase of it.

The Court: The record will not bear you out on that fact. Call another witness. You are excused, lady. [295]

MARY STEWART

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name for the record.

A. Mary Stewart.

Q. Where are you employed?

A. At the Southern Pacific Sanitorium.

Q. How long have you been employed there?

A. About five and a half years.

Q. Where do you reside?

A. 123 N. Plumer, Tucson.

Q. What is your position at the Southern Pacific Sanitorium?

A. I am a stenographer-clerk.

Q. As such what are your duties?

A. I have various duties, taking admissions of patients and accident reports and other office work.

Q. I will ask you to examine the Plaintiff's Exhibit H for identification there, and tell me whether or not you have seen that document before?

A. Yes, I have.

Q. When did you first see the document?

A. Well, I first saw it when I took this accident report from the patient. [296]

Q. Do you recall the date? Can you tell from the examination of it the date it was taken?

A. October 3rd.

(Testimony of Mary Stewart.)

Q. What year? A. 1946.

Q. And who was present when you took it, if you recall? A. Just the patient and myself.

Q. What was the purpose of taking that statement?

Mr. Gillen: Objected to as calling for a self-serving statement and conclusion.

The Court: Answer it.

(Question read.)

A. We take accident reports from all injury patients so we will have a record of it for our charts.

Q. I will ask you whether or not you prepared the statement that appears there?

A. Yes, sir, I did.

Q. Whose signature does it bear? I am talking about the top half.

A. It bears my signature and the patient's signature.

Q. And the information that appears on that statement is in your handwriting?

A. Yes, it is.

Q. From where did you get that information?

A. I got the top information from the patient.

Q. How did you get it from him?

A. I asked the patient the questions from his bedside.

Q. Was it then or some later time it was signed by you and the patient?

A. No, it was at that time.

(Testimony of Mary Stewart.)

Q. And that is your own handwriting?

A. Yes, it is.

Q. And the lower part of it is your handwriting also?

A. That is right.

Q. Is the signature there of the doctor? Whose signature is that?

A. I signed for the doctor.

Q. Is that the usual practice?

A. It is.

Q. You conversed with the patient at the time you were taking that statement?

A. Yes.

Q. Did he apparently know what he was talking about?

A. Apparently he did.

Mr. Gillen: I move that be stricken so that I may interject an objection.

The Court: What?

Mr. Gillen: I move the answer be stricken.

The Court: Disregard the answer to the question, Gentlemen of the Jury. Ask the question again and don't [298] answer it, lady.

Q. I ask you whether or not the patient at the time you took the statement apparently knew what he was doing in making you the answers.

Mr. Gillen: I object to it as calling for her opinion and conclusion.

The Court: She may answer.

A. Apparently the patient knew what he was doing.

Q. (By Mr. Thompson): Did you have any previous knowledge about the matters appearing in the upper half of that, before you talked to the patient?

A. No, I did not.

(Testimony of Mary Stewart.)

Q. Had you had any previous information where or how he was injured prior to the time you took that statement? A. No.

Q. At that time you were not acquainted with the patient that signed it? A. No, I wasn't.

Q. Did the patient sign it in your presence?

A. Yes.

Q. Do you know whether or not this is the person who signed that statement?

A. Yes, I believe he is.

Q. You mean the plaintiff who sits here by counsel? A. That is right. [299]

Q. You had occasion to see him for some time after that in the sanitorium?

A. Yes. He was an out patient after that.

Q. An out patient? A. Yes.

Mr. Thompson: At this time, if it please the Court, I offer in evidence the upper half of the exhibit, Exhibit H, that part appearing above plaintiff's signature.

Mr. Gillen: I ask your Honor reserve his ruling until I have had a chance to examine on it.

The Court: It is admitted provisionally the same as the other exhibits. Now cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Now, Mrs. Stewart, you say you had no previous knowledge concerning this patient's case until this date of October 3, 1946? A. No, I didn't.

(Testimony of Mary Stewart.)

Q. Hadn't it come to your attention this patient was a Southern Pacific employee who had been a patient for some six weeks at the St. Mary's Hospital in Tucson?

A. Had it come to my attention, you say?

Q. Yes. A. I don't remember.

Q. Hadn't it come to your attention this very office was [300] requesting a transfer so that the expense to the railroad of leaving the patient in the St. Mary's Hospital could be obviated and the patient could be brought to the sanatorium conducted by the Southern Pacific.

Mr. Thompson: If it please the Court, I want to make just this objection. The question of counsel has assumed something not in evidence and something contrary to the fact.

The Court: Answer it. Do you want the question read?

The Witness: Yes.

(Last question read.)

A. No, because I don't handle that part of it. The manager handles that.

Q. Do you have any recollection of how the patient came to the hospital?

A. I didn't see the patient come into the hospital.

Q. You didn't see the patient come in?

A. No.

Q. You don't know whether the patient was ambulatory or non-ambulatory?

(Testimony of Mary Stewart.)

A. The patient probably came by ambulance and came to the back door, I don't know.

Q. When did you first see the patient?

A. When I took the statement from him at his bedside.

Q. Was this in the nature of an admission?

A. No, I did not take the admission. I got the accident report.

Q. You took the accident report?

A. Yes. That is the accident report.

Q. Do you recall where you saw this patient?
Was it at his bedside? A. Yes.

Q. Do you recall what ward or where he was?

A. No, I don't.

Q. Do you recall how long the patient remained at the Southern Pacific Sanitorium?

A. No, I couldn't state how long he was there.

Q. Was it within your knowledge or recollection the patient was only there seven days, then he was transferred due to a change in his condition back to St. Mary's Hospital? A. No, I don't know.

Q. Do you have anything to do with discharging the patients? A. No, I don't.

Q. Do you have anything to do with admitting patients? A. Yes.

Q. But you didn't admit this patient?

A. No, I didn't.

Q. Do you recall going to this patient and telling him you wished to have him sign an admission request? [302]

(Testimony of Mary Stewart.)

A. An admission request?

Q. Yes, or admission blank or something to do with admission?

A. Nothing to do with admission, no.

Q. You don't recall saying that to him?

A. No.

Q. Do you recall saying anything to the patient about requiring him to sign a request for a transfer?

A. No, I don't.

Q. From one hospital to another?

A. No, I don't.

Q. Where did you get your information you put in over the signature of the doctor which you say you signed?

A. We get that from the doctor or from the patient's chart.

Q. Do you know how you got this?

A. No, I can't remember.

Q. Can't remember whether you got it from the doctor or the patient's chart? A. No.

Mr. Gillen: I think that is all.

Mr. Thompson: The exhibit was admitted conditionally as the others?

The Court: That is right.

LELAND E. LYONS

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows: [303]

Direct Examination

By Mr. Thompson:

Q. Please state your name.

A. Leland E. Lyons.

Q. What is your employment, Mr. Lyons?

A. Division engineer on the Rio Grande Division.

Q. Will you speak up?

A. Division engineer on the Rio Grande Division.

Q. For the Southern Pacific Company?

A. Yes, sir.

Q. How long have you been employed by the Southern Pacific Company?

A. March 20, 1920.

Q. Were you employed by the Southern Pacific Company in August, 1946? A. Yes, sir.

Q. Calling your attention to the date of August 29, 1946, where were you living at that time and what was your official position with the Southern Pacific Company?

A. I was living in Tucson, Arizona, and I was assistant division engineer on the Tucson Division.

Q. Do you have occasion to recall the date of August 29, 1946? A. Yes, sir.

Q. What recalled it to your mind? [304]

(Testimony of Leland E. Lyons.)

A. On that date what recalls it to my mind is the fact that, of this accident at Willcox, on that date I made a motor car inspection trip.

Q. Will you tell the Jury just where you were and what you did on the date of August 29th?

Mr. Gillen: Just a moment, objected to as incompetent, irrelevant and immaterial, not bearing upon the issues of the liability, what he did on that day.

The Court: He may answer.

A. On the morning of August 29 I made arrangements to make a motor car inspection trip with the roadmaster at Bowie, Mr. Wisner, going to leave Bowie about eight o'clock in the morning towards Tucson, our motor car inspection trip being made to inspect the track, switches, and so forth, for maintenance purposes. I proceeded with this particular roadmaster to Willcox and west of Willcox to the end of his district which is known as Cochise.

Q. Now, Mr. Lyons, did you later have occasion to visit the scene of the accident in which the plaintiff, Mr. Schnee, was involved? A. Yes, sir.

Q. With reference to that point I will ask you whether or not you, in company with Mr. Wisner, passed over that particular stretch of track on August 29th? A. Yes, sir. [305]

Q. At about what time?

A. Well, it could have been—it was in the early forenoon, possibly between ten and eleven o'clock.

Mr. Gillen: What date was this?

Mr. Thompson: August 29th.

(Testimony of Leland E. Lyons.)

Q. I will ask you whether or not later that day you heard of an accident that had happened to the plaintiff, Schnee? A. Yes.

Q. And what, if anything, did you do with respect to investigating that accident and when did you make that investigation?

A. I made arrangements to go to the site of the accident the next morning.

Q. And did you go there? A. Yes.

Q. Who accompanied you?

A. Signal supervisor Jacobson.

Q. Is that A. C. Jacobson? A. Yes, sir.

Q. Are those his initials? A. Yes, sir.

Q. Did you go directly to that point upon reaching Willcox? A. Yes, sir.

Q. And how were you directed there?

A. We arrived by automobile or pickup truck the early part [306] of the morning, determined where the accident was, or approximate location of it, then drove directly there, parked the automobile on the highway and found the site of the accident.

Q. Will you just tell the Jury in your own words what, if anything, you found there that was out of the ordinary? What came to your attention that morning with respect to the condition of the rails and the track?

A. On arriving at the site and determining it was the site due to the physical disturbance of the ballast and marks on the ties which indicated that a derailment of some sort had occurred at this loca-

(Testimony of Leland E. Lyons.)

tion, finding evidence that unquestionably this was where the derailment was; and it fitted our location described to us as being approximately two miles east of Willcox, we started examining the track to determine what might have caused the derailment, and in the course of this examination we looked for flange marks or a point of derailment, as we refer to in an accident of this nature, on the rails to see if we could see any flange marks on the rails themselves. We found none. We found marks to the south of the north rail which were unquestionably flange marks of the motor car. We found a tie to the west of the derailment which had indications of a stick or something having been forced into the westerly side of the tie. At that time the motor car had been removed [307] and had been hauled to Willcox. The tools had been picked up. It was evident in my mind——

Mr. Gillen: Pardon me. I would like to interrupt the witness and ask that a portion of the witness' answer be stricken as a pure conclusion. This is a long narration and I am compelled to interrupt.

The Court: Motion denied.

Mr. Gillen: Does your Honor care to hear what portion?

The Court: Yes, state your motion.

Mr. Gillen: The portion I wish to have stricken is the portion where the witness says, "We found a tie that appeared to have had a stick or something pushed into it on the west side." I move the Court

(Testimony of Leland E. Lyons.)

it be stricken on the ground it is pure opinion and conclusion; also it is too remote as to time.

The Court: Motion denied. Continue.

Q. I will ask you whether or not you have seen, showing you those photographs, the first one on top being Defendant's Exhibit C-4 for identification, and ask you if you have seen that photograph before, Mr. Lyon? A. Yes, sir.

Q. Then calling your attention to the next exhibit in order, Defendant's Exhibit C-5 for identification, and ask you if you have seen that photograph before? A. Yes, sir. [308]

Q. Now, calling your attention again to C-4, did you see the tie portrayed in that photograph, on the morning of August 30, 1946? A. Yes, sir.

Q. Does that photograph portray what you saw with respect to that tie? A. Yes, sir.

Q. Describe this indentation or abrasion you saw in the westerly side of the tie that you have been referring to, Mr. Lyons.

Mr. Gillen: Object to the question as incompetent, irrelevant and immaterial. There is no evidence here to establish this particular witness inspected this particular tie prior thereto or whether he knows what the condition of the tie was before the accident occurred to Mr. Schnee, or what was done in the intervening 24 hours after the accident occurred to Mr. Schnee and before he arrived on the scene.

(Testimony of Leland E. Lyons.)

The Court: Objection overruled. Read the question.

(Question read.)

A. This mark, as described on this tie, very definitely indicated——

Mr. Gillen: Just a moment. What it indicated and how it indicated is not a description.

Q. Just describe what you saw. [309]

A. I saw enough evidence on that tie——

The Court: No, just testify what you saw.

A. I saw portions of a stick thrust into the side of that tie on the westerly side thereof.

Q. You say a stick. Describe the stick if there was a stick there.

A. There was no stick on the ground. I saw the remains of a stick.

The Court: How do you know it was a stick rather than a piece of metal?

A. It was wood, Your Honor.

The Court: Still some remains there?

A. Yes, sir.

Q. (By Mr. Thompson): That were still in the tie? A. Yes.

Q. Do you recall approximately, with respect to the north and south rail at that point, taking away from Willcox as railroad east, with respect to the north and south rail where was this mark of the stick on the tie?

A. It was north of the south rail about sixteen inches.

(Testimony of Leland E. Lyons.)

The Court: What is the full width between rails?

A. Four feet eight and a half between gauge.

Q. You mean center to center?

A. Inside edge of the rail to the inside edge of the other rail is four feet, eight and a half. [310]

Q. By Mr. Thompson): Isn't that the top of the rail? A. The top of the rail.

Q. That is where the cars run?

A. Where the flanges strike the rail, yes, sir.

Q. With respect to this mark you saw on the tie, where if any place did you see flange marks?

A. East of that.

Q. Approximately how far from this tie you have been describing with the stick mark, how far was the first flange mark you observed?

A. There was one mark approximately twelve feet, as I remember, and another mark about twenty-one feet; then there were intermittent marks, the exact distance I do not recall.

Q. Where do they lead, those marks?

A. They lead towards the north side of the rail or towards the highway.

Q. And with respect to, away or toward Willcox?

A. Away from Willcox.

Q. Where did those marks end, if you know?

A. The motorcar, the marks extended for a distance of about one hundred and twenty feet and approximately half of that distance the motorcar appeared to have crossed the rail and landed on the outside or north of the north rail on the subgrade of the roadbed.

(Testimony of Leland E. Lyons.)

Q. With respect to these marks you saw on the ties, were [311] they running straight with the rails or at an angle?

A. At an angle with the rails.

Q. Angle which direction?

A. To the north.

Q. Where you saw the first flange marks on the ties, were there any marks on the ballast on the north side of the rail you observed?

A. Yes, sir.

Q. You say the distance from the point where you saw the tie marked by the stick to the last of the marks was about one hundred and twenty feet?

A. Approximately one hundred twenty feet. I remember checking three rail lengths, three times 39 would be 117 feet, be in the neighborhood of where the car came to rest. The ground was disturbed. You couldn't tell the exact location of that car at that particular point.

Q. With respect to the tie you found marked there, where was the mark approximately with respect to the top of the tie?

A. It was down on the west face of the tie three to four inches. It wasn't on the top of the tie.

Q. And could you describe it further as to the angle of that mark? Was it straight up and down?

A. It looked like it was protruding in the tie on approximately a forty-five degree angle.

The Court: How far into the tie? [312]

A. Approximately a half of an inch.

(Testimony of Leland E. Lyons.)

Q. Could you give any dimension of width, size of the hole?

A. About an inch, or the over-all approximately an inch. It was embedded in there tight, Your Honor, dug it out with a penknife.

Q. (By Mr. Thompson): What was the diameter of the hole you saw there or mark, how the tie was marked?

A. It was a mark about three-quarters of an inch square, that is where it protruded into the tie.

Q. I believe you stated that Defendant's Exhibits C-4 and 5 are a portrayal of that mark and that tie as you saw it there on the morning of August 29, 1946, is that correct?

A. I think it was the morning of August 30, 1946.

Q. August 30, 1946, that is correct, is it?

A. May I have your question again?

Q. Those pictures, those Exhibits C-4 and 5 correctly portray the tie and marks you saw on the ties on the morning of August 30, 1946, about which you have been testifying? A. Yes, sir.

Mr. Thompson: We offer those two Exhibits, Your Honor.

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial. There is no foundation laid to show this had anything to do with the accident. It hasn't been established whether or not he knew that was in the same condition or in a changed condition prior to the accident. [313]

(Testimony of Leland E. Lyons.)

The Court: They are admitted.

(Defendant's Exhibits C-4 and C-5 in evidence.)

Q. (By Mr. Thompson): Mr. Lyons, that day of August 30, 1946, did you at any time examine a motorcar which had been involved in this accident?

A. No, sir.

Q. And from the point of the accident, where did you go?

A. I went from the point of the accident back to Willcox, then back to Tucson.

Mr. Thompson: I believe that is all.

Cross-Examination

By Mr. Gillen:

Q. Did I understand you to say that you saw a tie with a scar or abrasion on it and some parts of wood protruding from it so firmly wedged therein it had to be pried out with a penknife, is that correct? A. Yes, sir.

Q. Did you pry it out with a penknife?

A. No, sir.

Q. Who did? A. Mr. Jacobson.

Q. At whose direction did he do it?

A. At my direction. Let me take that back. Can I clarify something?

Mr. Thompson: No, go ahead and answer the question. [314]

A. Indirectly at my direction.

(Testimony of Leland E. Lyons.)

Q. (By Mr. Gillen): Indirectly at your direction? A. Yes, sir.

Q. You were his superior, were you not?

A. Yes, sir.

Q. You were investigating the accident?

A. Yes, sir.

Q. You knew a boy had been very badly hurt?

A. Correct.

Q. You knew it was important to determine what had caused the accident? A. Correct.

Q. You were seeking evidence of that to be able to report to your superiors and be able to protect the interests of the company, is that so?

A. Partially so.

Q. And you were gathering evidence and preserving evidence that would tell the story of the accident? A. Correct.

Q. All right, what happened to the splinters that were pried out of the tie you say you saw?

A. I do not know.

Q. Did you instruct anybody to preserve them?

A. I did not.

Q. When did you see this stick or the remnants of a stick? [315] A. When did I see it?

Q. Yes.

A. The morning I made the investigation on the ground.

Q. The morning of the 30th of August?

A. You mean the part I saw in the tie?

Q. You referred to a stick in answer to a question by His Honor, you referred to remnants of a stick? A. What was the question?

(Testimony of Leland E. Lyons.)

Q. Where did you see it?

A. I never saw the stick.

Q. You never saw the stick? A. No, sir.

Q. Did I misunderstand you or did you misunderstand His Honor? I thought His Honor asked you if you had seen a stick and you said it was wood; then you said you saw the remnants of a stick.

A. I am mixed up on that. I endeavored to indicate to His Honor I had seen evidence which indicated it was a stick and not metal, it was wood.

Q. Were you therefore all the time in both answers to Mr. Thompson and His Honor, were you referring all the time to the splinters you saw in the tie? A. Yes.

Q. I see. And you never saw a grade stake or banged or chewed up or scarred surveyor's grade stake? [316] A. No, sir.

Q. Did you go to the signal maintainer's shed at Willcox?

A. Not to the immediate vicinity of the shed, no, sir.

Q. You were making an investigation; was there any reason why you didn't look in at the handcar or any reason why you didn't look at anything else that was evidence in that case?

A. The investigation after the preliminary portion was determined was turned over to Mr. Jacobson.

Q. I am asking you, was there any reason why

(Testimony of Leland E. Lyons.)

you didn't follow through and see all of the evidence there was?

A. I can't remember at this time why there was any reason.

Q. Now, Mr. Lyons, Mr. Robert Ward, you are acquainted with him, are you not?

A. Yes, sir.

Q. Would it refresh your recollection if I were to tell you that the record would reveal here that Mr. Robert Ward testified here that on the day following the accident that he took you and Mr. Jacobson to the signal maintainer's shed where he had the handcar involved in the accident and a damaged grade stake, surveyor's grade stake, picked up at the scene of the accident, under lock and key, and that he exhibited to you two gentlemen at that time both the car and the surveyor's grade stake, would that refresh your recollection as to whether or not you saw the stake? A. It does not.

Q. You would say Mr. Ward was mistaken at least about your presence there? A. Yes, sir.

Q. So you left the investigation in the hands of Mr. Jacobson? A. Correct.

Q. And didn't give him any directions what he should do with the evidence; left it entirely up to him? A. Correct.

Q. Did you ever talk to Mr. Caldwell about this investigation? A. Mr. who?

Q. Mr. Caldwell, the Claims man?

A. About this investigation?

(Testimony of Leland E. Lyons.)

Q. Yes.

A. No, sir.

Q. He never interviewed you?

A. No, sir.

Mr. Gillen: I wonder if I might see the photographs of the tie. I saw them before but the significance of them wasn't pointed out to me. I am sorry, but I would like to have either the witness or counsel indicate to me what particular portion of this pretty well battered old tie, what portion they are referring to?

Mr. Thompson: Have the witness. [318]

The Court: Mark it for him. Mark it.

Mr. Thompson: Yes.

Mr. Gillen: Do you have something to mark it with?

The Witness: Ink would be best on this film.

The Court: Before you mark it, ask him what you want him to indicate?

Mr. Gillen: Well, I wanted him to indicate what portion he has described here as the portion of the tie where he observed splinters of wood embedded, and where they had been removed?

The Court: Can you indicate that place with a cross, Witness?

Mr. Gillen: If he would just circle the area.

Mr. Thompson: The other one as well, I guess.

(Witness indicates on Exhibits C-4 and 5.)

Q. (By Mr. Gillen): How large a hole would

(Testimony of Leland E. Lyons.)

you say was left in the tie after the splinters had been removed by Mr. Jacobson?

A. To the best of my memory, it would be a hole approximately three-quarters of an inch in diameter.

Q. Three-quarters of an inch in diameter; would you say it was a round hole?

A. It would give the indications of a round hole, but wouldn't necessarily be symmetrical and round.

Q. Generally round or generally square, that he left in the tie? If you care to have the Exhibit to assist you, I would [319] be glad to have it in your hands.

A. It would be generally square.

Q. Generally square?

A. It would be somewhat round but it could be square.

Q. Would looking at the Exhibit again assist you? A. Yes.

(Exhibits handed to witness.)

The Witness: Generally round.

Q. Now, sir, will you tell me what is the circumference of the head of a spike that holds the rail?

A. The circumference—in the first place a spike is not round to start with. The outside circumference might be in the neighborhood of—I can't answer that. I have never measured the circumference of a spike, the top of a spike you referred to.

Q. You couldn't lay your hands on a spike read-

(Testimony of Leland E. Lyons.)

ily over the noon hour? A. We could get one.

Q. Mr. Lyon, did you inspect this particular tie prior to the accident?

A. No, sir, I have no memory of it. I looked at all the ties, but whether I looked at this particular tie, I don't remember.

Q. On this particular inspection tour you weren't walking? A. No, sir.

Q. You were riding on a motorcar? [320]

A. Yes, sir.

Q. What rate of speed?

A. From six to fifteen miles an hour.

Q. When you say you looked at all the ties as you went along there you looked at them over the front of the motorcar or over the back?

A. Right.

Q. Of course, you didn't look front to back, front to back. You just looked one way or the other, is that right? A. That is right.

Q. Did you observe any other splinters of wood any place along other than this one tie?

A. On my inspection?

Q. No, on your investigation?

A. I do not recall observing any other splinters.

Q. Was Mr. Ward with you folks?

A. I do not recall Mr. Ward being with me.

Q. Just you and Jacobson?

A. To the best of my memory.

Q. Did Mr. Jacobson take you up to the point of first derailment and point out to you there in that vicinity any splinters of wood?

(Testimony of Leland E. Lyons.)

A. Mr. Jacobson and I were together, yes.

Q. My question is, did Mr. Jacobson point out at the point of first derailment as you have described it, where the car [321] first left the tracks, any splinter on the surface of the right of way or ballast?

A. I do not recall he pointed out any splinters on the ballast or ties.

Q. You were able to follow the course of that derailed car from the flange marks left in the ties astraddle the north rail all the way down to the point where the car came to rest, isn't that correct?

A. Yes, sir.

Q. The car traveled parallel but veered to the north with the track, is that correct?

A. Very definitely veering to the north.

Q. Then at one point about midway, the car, if you recall correctly, the car had completely jumped the track and proceeded along on the surface of the ground?

A. That was the indication, yes, sir.

Q. At the place where the car came to rest, you stated the ground was so disturbed you couldn't tell anything about the position of the car?

A. No, sir, I didn't say that.

Q. What did you say about where the car came to rest, the condition of the ground?

A. I said the ground was so disturbed you couldn't tell exactly where the car had traveled after it had derailed.

Q. You mean, after it had left the tracks? [322]

(Testimony of Leland E. Lyons.)

A. Yes, sir.

Q. Of course, you knew, did you not, a section crew was there the night before and had hauled up a flatcar and put the motorcar on that?

A. Yes, sir.

Q. And that might account for the disturbed appearance of the ground, is that correct?

A. It could have accounted partially for it.

Q. Had the ballast at this particular tie where you say you observed the wood embedded, had that ballast been disturbed?

A. The ballast appeared to have been crushed down a bit. I wouldn't say the ballast was particularly disturbed.

Q. Now, there appears in these photographs, to me at least, a distinct indentation in the ballast as compared with the rest of the surface. I will ask you, was that the way it appeared? Handing this to the clerk, I will ask you if you will look at those pictures again and tell us if that is the way it appeared to you on that day, or disturbed more since then for the purpose apparently of getting a photograph?

A. It isn't uncommon for the ballast to be down as it shows on this, down in comparison with the top of the tie.

Q. Was it that way when you saw it?

A. To the best of my ability, that was the way it was when I saw it.

Q. It is at a considerably lower level than the

(Testimony of Leland E. Lyons.)

rest of the [323] ballast alongside of that tie, is it not?

A. At the very point of that mark it appears to be so, yes, sir, probably six inches of it.

Q. The mark is well up toward the surface or top side of the tie, isn't it?

A. The mark is nearer the top surface of the tie than it is the bottom of the tie, if that is what you mean?

Q. (By Mr. Gillen): I don't have any further questions with the exception I would like Mr. Lyons to produce a spike if he will for possibly one question.

The Witness: Your Honor, what type of spike does the gentleman desire?

Mr. Gillen: The type that appears in the picture there.

The Witness: I can only assume that is a main line spike. I say that because there are various dimensions.

Mr. Gillen: That was certainly taken on the main line, wasn't it?

The Witness: Yes. In other words, I want to be sure that is what you want.

Mr. Gillen: It wouldn't be too much trouble to get one of each?

The Witness: I can get you one.

The Court: What kind of wood is that tie made of?

The Witness: That tie was possibly made of—I cannot answer that question. [324]

(Testimony of Leland E. Lyons.)

The Court: It was treated?

The Witness: Treated, unquestionably, because we do not use untreated ties on our main line.

The Court: 1:30, gentlemen.

(Whereupon a recess was taken at 12:00 o'clock noon until 1:30 o'clock p.m.)

Q. (By Mr. Gillen): Mr. Lyons, were able to secure some spikes?

A. Yes, sir. Do you desire it?

Q. Will you hand it to the lady who is Clerk of the Court? Did you measure it, by the way?

A. I measured as close as I could the so-called circumference of the elliptical head of the spike.

Q. Yes; what was it?

A. Four and nine-sixteenths, as carefully as I could measure the spike.

Q. What is the diameter?

A. It has two diameters. Which way do you have in mind? It isn't a circle.

Q. No, I understand.

A. It is elliptical.

Q. What diameter did you measure?

A. I did not actually measure the diameter, but the diameter of it as I checked with the plan is one and five-tenths one way and one and nine-sixteenths the other.

Q. A little over an inch each way? [325]

A. Almost an inch and a half, yes, in one case.

Q. I wonder if I might ask you to look again

(Testimony of Leland E. Lyons.)

at the different photographs, C-4 and C-5, and compare the hole that was dug in the tie with the spikes that appear in the picture for comparison of sizes.

Have you had an opportunity to compare the spikes; also the hole out of which the splinters were dug? A. Correct.

Q. By looking at them by comparison and knowing what the diameter of the spikes are, would that in any wise change your opinion as to the size of the hole that was dug in the tie?

A. Are you inferring that the head of this was driven in here?

Q. What is it?

A. Am I supposed to compare the head of this spike as to what I think the size of the hole was in the tie?

Q. Maybe I am not making myself clear. Your testimony was that there was a hole dug in the tie; that was, if I remember, three-quarters of an inch in diameter, is that correct?

A. That is correct.

Q. I am asking you to look at that hole in that tie as it appears in the photograph, compare it with the spikes that appear in the same photograph; I am asking you now, having in mind the diameter of the spikes, if that changes your opinion as to the size of the hole? [326]

A. No, sir.

Q. It does not. Now, let me ask you this. Then

(Testimony of Leland E. Lyons.)

when you made your tour of inspection between Willcox and the point of the accident or upon the afternoon or the day of the accident, and as I recall your testimony, prior to the happening of the accident, were there any work crews that you encountered on the way?

A. I do not recall any particular work crews, but unquestionably, there were. The Section Foreman of each section was unquestionably encountered.

Q. You don't recall if you saw any crews working at the time? A. On the entire distance?

Q. Between Willcox and railroad east to whatever point you went? A. I don't remember.

Q. You did go beyond the point of this accident on your tour of inspection? A. Yes, sir.

Q. Did you encounter any crew of surveyors working that day? A. I do not recall I did.

Q. You don't know whether you did or not?

A. I don't recall I did.

Q. Do you recall you didn't? A. No, sir.

Q. So you don't know whether you did or not?

A. Correct.

Q. Your inspection was to determine the appearance of the track and the ties with relation to regulations and safety, is that correct?

A. Correct.

Q. Did you see any surveyor's grade stakes along the way that you recall?

A. Not that I recall. Unquestionably I must

(Testimony of Leland E. Lyons.)

have seen some stakes, but I don't recall any particular stake.

Q. You think you must have seen some stakes that day but you don't recall specifically?

A. That is right.

Q. Of course, you have testified already that you didn't see the stake that Mr. Ward stated that he had under lock and key, and therefore you couldn't know of your own knowledge whether or not the splinters taken out of the tie by Mr. Jacobson in your presence were ever compared with the wood of this stake that was under lock and key? You understand my question?

A. I understand your question, yes.

Q. I am asking you now from your own knowledge?

A. Only hearsay.

Q. All right. Now, will you tell us what kind of a motor car you were operating that day, that is August 29th?

A. Fairmount, M-19 type car.

Q. Can you describe it for us?

A. Well, it is a four-wheel, belt driven, gasoline engine motor car, manufactured by the Fairmount people, what we call a Roadmaster's and Supervisor's inspection car.

Q. Does it have a superstructure in the middle?

A. It has a deck and it also has seats to the side for riding, which you would ride in the forward position. It has a clutch and a brake and ignition key for operating.

Q. Does it have tool wells?

(Testimony of Leland E. Lyons.)

A. Does it have what?

Q. Tool wells?

A. It has what we call tool wells.

Q. Will you describe tool wells such as are found on those motor cars?

A. It has a tray on either side, and it also has a compartment, small compartments for small tools such a pliers, screwdriver, on one side and another small compartment for the coils, electric coil to function the spark from the battery. It also has a battery underneath the deck.

Q. The tool well, has that a ledge all around it to keep things from dropping out of it?

A. Yes, sir.

Q. Can you give us the dimensions of height of the ledge around the tool box?

A. Approximately two and a half inches on the side and the [329] rear.

Q. Approximately two and a half inches on the side and rear?

A. Approximately above the deck, above the floor of it.

Q. Above the floor surface of the tool box?

A. Yes, sir.

Q. What about the front?

A. The front is raised approximately, to the best of my memory, about nine inches.

Q. About nine inches in front and those tool wells are put in those cars for the purpose of carrying equipment, tools and things?

(Testimony of Leland E. Lyons.)

A. For the purpose of carrying miscellaneous equipment.

Q. Are the ledges on the side and back, are they flush with the floor of the tool well, or is there an opening? A. They protrude above.

Q. I know that, but I say the wall of the ledge, if we may call it such, is it flush with the floor of the tool well or is it separated? You understand me?

A. In other words, is it a square corner of a box, I believe you are trying to say?

Q. Yes. A. Yes.

Q. There is no opening there?

A. Not that I remember.

Q. Is there any difference between the type motor car you [330] were operating that day and the type motor car involved in this accident?

A. Their construction is similar, but the other motor car was an M-9, I believe a smaller motor car, a shorter wheelbase.

Q. You mean the division and roadmaster have a more stylish motor car?

A. No, it will haul six men comfortably, while the other motor car will probably haul three.

Mr. Gillen: That is all.

Redirect Examination

By Mr. Thompson:

Q. Mr. Lyons, what is the height of the stand-

(Testimony of Leland E. Lyons.)

ard rail at the point of this accident, what was the height of those rails from tie to top?

A. Approximately very close to eight inches.

Q. And the ties are spaced how close together as standard?

A. The standard space is eighteen and a half inches, sometimes vary to eighteen inches.

Q. That is center of tie to center of tie?

A. Center to center.

Q. The width between the gauge, I believe you have given us?

A. Four feet, eight and a half inches.

The Court: How wide are the ties?

A. The ties are seven by nine. They are nine feet on the surface and seven inches and will vary from eight and three-quarters [331] to nine inches; eight feet in length.

The Court: What kind of ballast?

A. Slag, Your Honor.

Q. And they are joined, are they, the rails, by what method?

A. The rails are tied together by what we call sickle bars with four bolts.

Q. The rails are fixed how?

A. By spiking through the tie plate.

Q. (By Mr. Thompson): Talking now about this tie you said had the mark of a stick, could you have been mistaken about that? Could that have been the mark of a spike such as this, Mr. Lyon?

A. No, sir.

Mr. Gillen: Just a moment. May the answer be stricken. I want to offer the objection.

(Testimony of Leland E. Lyons.)

The Court: Disregard the answer.

Mr. Gillen: I offer the objection that counsel's Redirect Examination is improper; also he is Cross-Examining his own witness, asking his own witness if he is not mistaken about something that his own witness has testified to.

The Court: Read the question.

(Question read.)

The Court: Answer it.

A. No, sir.

Mr. Thompson: That is all. [332]

Mr. Gillen: That is all.

ALFRED C. JACOBSON

called as a witness herein by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. Please state your name.

A. Alfred C. Jacobson.

Q. Where do you reside?

A. Oakland, California.

Q. Where were you residing in August, 1946?

A. Tucson, Arizona.

Q. Are you now employed by the Southern Pacific Company? A. Yes, I am.

Q. Were you employed by the Southern Pacific Company in August, 1946? A. Yes, sir.

(Testimony of Alfred C. Jacobson.)

Q. On the 30th of August, 1946, what was your position with the Southern Pacific Company?

A. Signal Supervisor on the Tucson Division.

Q. And that extends from Lordsburg to Yuma, does it? A. That is right.

Q. Main line through Willcox was on your territory? A. Yes, sir.

Q. You are acquainted with the plaintiff here, Adolph Schnee? [333] A. Yes.

Q. Had you known him prior to August 30, 1946?

A. Yes, sir, I interviewed Mr. Schnee when he was employed.

Q. Was a report made to you that Mr. Schnee had been injured some time late in August, 1946?

A. Yes, sir.

Q. What if anything did you do with respect to that information, Mr. Jacobson?

A. On the day Mr. Schnee was injured I was at Tucson, and late in the afternoon or evening I received a telephone call advising me of that accident.

Q. Did you ever go then after that to the scene of the accident?

A. The following morning I did.

Q. Who was in your company, if you recall?

A. Mr. Lyon was with me.

Q. That is Mr. Lyon who was then Division Engineer? A. Assistant Division Engineer.

Q. How did you go to the scene of the accident?

(Testimony of Alfred C. Jacobson.)

A. We drove there in an automobile or pickup, I believe it was.

Q. To what point did you go first?

A. On arrival at Willcox we stopped at Mr. Ward's house, Signal Maintainer, and asked Mr. Ward to get the detail of the location of the accident; then we proceeded to the place [334] where it occurred.

Q. At that point did you make any examination?

A. Yes, sir.

Q. Now, will you tell the jury in your own words as near as you can recall just what you saw and observed at that place that was out of the ordinary at all?

A. Well, sir, the motor car had been removed. There were marks on the ties between the rails indicating a motor car had left the rail and diverting the accident from the south rail to the north rail. The marks on the ties proceeded in an easterly direction towards the north rail. There were a number of ties marked. Then, the grass was considerably trampled where the ground had the appearance of the motor car having come to rest. Of course, my first interest was to attempt to discover what caused the derailment, and on walking west from the marks on the ties I found one tie that had been pierced with something that had all the appearance of being a stick. In fact, there were wooden fibers driven into the tie that were still there and in view of the fact that there was nothing

(Testimony of Alfred C. Jacobson.)

else in the vicinity where the derailment occurred, it was logical——

Q. No, wait. We won't ask you to draw any conclusions. You say you found this tie with reference to where the motor car came to rest, how far was it from where the motor car came to rest?

A. It was west from where the motorcar came to rest and about one hundred and twenty feet.

Q. In what position on this tie did you find this mark, Mr. Jacobson?

A. It was on the west side of the tie.

Q. And with respect to the top of the tie as it was placed on the ground, what was its location?

A. Oh, three or three and a half inches below the top edge of the tie.

Q. Was it possible at all to determine how it had been driven into the tie, whether straight down or at an angle?

A. No, it was at an angle, approximately 45 degrees that angled toward the tie.

Q. Were the marks on the ties which you found of the flanges, in what direction were they from this place where you found marked in the tie with the splinters? A. They were east of that point.

Q. What was the distance of the first you found?

A. There was one mark on the tie adjacent to the south rail about twelve feet from that tie, and another mark about twenty-one feet. There were several marks from there on diagonally across.

Q. With respect to the rails, where was this

(Testimony of Alfred C. Jacobson.)

mark you found on the tie that you have been referring to?

A. It was between the rails and from fourteen to sixteen [336] inches from the north rail.

Q. Now, were the splinters that you found there in the tie, were they similar to the material of which the tie was made? A. No, sir.

Q. And the grain of those splinters with respect to the grain of the ties, what was their situation?

A. The splinters—of course, the grain in the tie was horizontal and the splinters in this hole were lengthwise of the hole.

Q. And the grain of the tie was what?

A. Just at right angles.

Q. Then, did you find anything else at or around this point when you made your investigation, Mr. Jacobson?

A. Yes. There was a brake hanger between the rails.

Q. Where was the brake hanger?

A. It was west.

Q. Where with reference to this mark on the ties did you find the brake hanger?

A. It was also about one hundred and twenty feet from the mark we found on the tie.

Q. With respect to the rails, where was it?

A. It was between the rails.

Q. What was its position when you saw it?

Mr. Gillen: Pardon me. I offer the objection it is [337] incompetent, irrelevant and immaterial,

(Testimony of Alfred C. Jacobson.)

in view of their own testimony in this case it had been picked up, examined and put down again.

Mr. Thompson: I understand the testimony of the witness it was replaced where he found it.

The Court: You may answer.

(Question read.)

The Witness: It was laying on the ballast in what appeared to have been a place where it had been laying for some time.

Q. Then, did you from the point of the accident, did you go to any other place on that day, Mr. Jacobson, with respect to this investigation? Did you make any further investigation at any other point that day?

A. Well, after investigating at the site of the accident, we returned, rather I returned to Willcox.

Q. When you were at the scene of the accident that day, were any pictures taken in your presence?

A. Yes, sir.

Q. By whom?

A. By the S. P. photographer, I can't think of his name at the moment.

Q. He was an employee of the company?

A. Yes, sir.

Q. Turning the back of the first Exhibit, what is the [338] Exhibit, Mr. Jacobson? There are two separate Exhibits.

A. Exhibit C-3.

Q. There is more than one document?

A. C-4.

(Testimony of Alfred C. Jacobson.)

Q. Will you tell me which of those, if either of those Exhibits, were taken in your presence on August 30, 1946? A. C-1, C-2, also C-3.

Q. Starting with C-1, where was that picture taken? A. That was taken at Willcox.

Q. What did it purport to show?

Mr. Gillen: Just a moment. May it please the Court, the sites of these pictures have all been located. It is a matter of wasting time, relocating the sites. The photographer said he was out there and took the pictures at certain places.

Mr. Thompson: All right, I will offer them in evidence, then. Those are C-1, 2 and 3.

The Witness: Yes, sir.

The Court: Admitted.

Mr. Gillen: May I see the pictures? I don't have in mind which pictures they are.

The Witness: C-4 and C-5 were also at Willcox.

Mr. Gillen: I would offer the objection. May it please the Court, to C-1 and C-2. No objection to C-3. My objection to C-1 and C-2 is that they are posed or set-up pictures on something that the foundation hasn't been laid for yet, and [339] we would like Your Honor to look at them if you would.

The Court: I don't need to. They are admitted.

(Defendant's Exhibits C-1, C-2 and C-3 in evidence.)

Q. (By Mr. Thompson): Referring first to the first two that are separated there, that picture.

(Testimony of Alfred C. Jacobson.)

A. C-5.

Q. C-5, and what did that picture show?

Mr. Gillen: No objection to them being offered in evidence, those two pictures.

The Court: They are admitted.

Mr. Thompson: They are already in evidence.

Q. With regard to this tie you found marked, is that shown in the Exhibit C-5? A. Yes, sir.

Q. How about C-4? A. And C-4 also.

Q. Turning to the next Exhibit, that is the picture you had taken of what?

A. That was of the motorcar that was derailed.

Q. That was the motorcar that had been involved in the accident? A. Yes, sir.

Q. You took it where, or had it taken where?

A. At Willcox.

Q. With respect to the toolshed at Willcox, where? [340]

A. Just outside of the toolshed.

Q. Does it show the underside of that car?

A. Yes, sir.

Q. Calling your attention now to the point in the picture where the stick is pointing, I will ask you what you found under the car at that point when you examined it that morning in Willcox?

A. There was a piece of splintered wood under it.

Q. It was wedged under what part of the car?

A. Under the brake rod.

Q. Of the motorcar? A. Of the motorcar.

Q. Now, at the time you went to the toolhouse,

(Testimony of Alfred C. Jacobson.)

were you shown any other articles that had come from the scene of the accident, Mr. Jacobson?

Mr. Gillen: Just a moment. That would be calling for an opinion and conclusion, what came from the scene of the accident.

The Court: Answer yes or no.

A. Yes, sir.

Q. What were you shown that morning?

The Court: What are you getting at now?

Q. (By Mr. Thompson): Were you shown a surveyor's stake or stick of some kind that morning?

A. Yes, sir. [341]

Q. Who showed it to you? A. Mr. Ward.

Q. Did you have an occasion to examine it there or did you examine it there that morning?

A. I did.

Q. Now, this stick or stake he showed you, what did it look like, describe it to the jury.

A. It was about twenty-four inches long and it was made of three-quarter inch by an inch and a half stock and had the appearance of having been sharpened on one end; the other end had obviously been broken off.

Q. The ends of the stick, can you describe them?

A. The pointed end apparently and originally had the same point that a so-called grade stake would have with about an inch or an inch and a quarter broken off.

Q. What was the condition of the other end?

A. The other end was broken off and obviously

(Testimony of Alfred C. Jacobson.)

had been splintered, and on examining it with the shreds or fibers that were between the brake beam and the deck of the motorcar, it appeared that it had been broken off or those fibers had been broken off from the grade stake.

Q. I will ask you, did you see any other markings or marks on this grade stake of any kind?

A. Yes, there was a grease mark at the end where the fibers had broken off which quite obviously came from the grease on [342] the brake rod; then there were indications the stick had been used for stirring caustic soda——

Mr. Gillen: I move that be stricken as an opinion and conclusion of the witness without a foundation having been laid and without showing this man ever had any experience in that line.

The Court: Not for that reason, but another one. Disregard the last answer of the witness, gentlemen.

Q. Mr. Jacobson, was there a picture taken of that stick or stake there at the time the picture was taken of the motorcar?

A. Yes, I had the stick in my hand.

Q. Calling your attention to the Exhibits in evidence there, which Exhibit there shows the picture of the stake which you had in your hand?

A. C-1.

Mr. Gillen: May I see C-1, please.

Q. (By Mr. Thompson): Mr. Jacobson, in your employment for the Southern Pacific Company, did

(Testimony of Alfred C. Jacobson.)

you have occasion ever to build the signal batteries such as used on the railroad? A. Yes, sir.

Q. For over how long a time?

A. Well, for, oh, possibly ten years.

Q. Did you ever have occasion to observe what action if any the battery solutions have on wood during that period [343] of time? A. Yes, sir.

Q. With respect to this stake, could you describe it then, what appearance it had, if any, with respect to whether or not it might have been used in such a solution?

Mr. Gillen: I offer the objection that there was no foundation he used this particular kind of wood or had any experience with it. Our understanding from the evidence is grade stakes are never used in battery solution, orange box wood is used.

The Court: I think the question is objectionable. I did permit a question which said it appeared to have been in contact with this, that, or the other thing.

Q. Let me ask you then, Mr. Jacobson, if this stake ever appeared to have come in contact with any foreign substance, corrosive substance of any kind? A. Yes, sir.

Q. What length of the stake did it show that appearance?

A. As I recall, about eight or nine inches.

Q. Calling your attention now to Defendant's Exhibit C-2, calling your attention particularly to a stick shown under the car, portrayed there, was

(Testimony of Alfred C. Jacobson.)

that the stake about which you have been testifying?

A. That is the same stake.

Q. Now, the car in Exhibit C-1 shows it was being propped [344] up by some kind of stick or stake, what was that?

A. I believe it was either a sledge hammer handle or pick handle.

Q. The purpose of that was to see the under side of the car? A. That is right.

Q. Calling your attention again to C-1, will you with a pin or something mark on the exhibit where you found this wood that you said was wedged under the brake rod?

(Witness indicates on exhibit.)

Q. You have so marked Defendant's Exhibit C-1 at the point where you said you saw the wood left under the brake rod? A. Yes, sir.

Q. Calling your attention to Plaintiff's Exhibit 1, 2 and 3, I will ask you if you have seen those photographs before and what they show, if you know? A. Yes, I have seen the photographs.

Q. What are they?

A. They are photographs of the same car.

Q. *Were taken* under your direction?

A. No, I wasn't present when these pictures were taken.

Q. You can identify it as being the same motor-car, is that correct? A. Yes, sir.

Mr. Thompson: We offer them in evidence as Defendant's Exhibits J, K and L. [345]

(Testimony of Alfred C. Jacobson.)

The Court: Admitted.

(Defendant's Exhibits J, K and L in evidence.)

Q. Calling your attention to these photographs, Mr. Jacobson, particularly Defendant's Exhibits J, K and L, I will ask you if those exhibits show the wood that you said you found under the brake rod?

Mr. Gillen: I think the pictures speak for themselves, may it please the Court.

Mr. Thompson: I merely want to have him circle it so it may be identified by the jury.

The Witness: Yes, it does.

Q. Will you mark with the pin the circle of the point where that appeared?

(Witness indicates.)

Q. Let me ask you this, Mr. Jacobson, between the time you found the stick until the pictures were taken, were any changes made, any paint, anything of that kind placed on the stick or stake you testified you found——

Mr. Gillen: That would be calling for an opinion, calling for a conclusion.

Mr. Thompson: I am asking as far as he knows.

A. As far as I know, no.

Mr. Gillen: It has not been established that it was in his possession or care. It was out of his possession for 24 hours or so and had never been in his possession for [346] 24 hours or so after the accident. And there is no foundation laid and it

(Testimony of Alfred C. Jacobson.)

hasn't been established how long he had it in his possession afterward, if at all.

Mr. Thompson: Withdraw the question.

Q. How long were you at the toolhouse that morning, Mr. Jacobson?

A. I would say at least an hour.

Q. And during the time you were there, it was during the time you were there you observed this stake or stick you identified in evidence as being one of the Defendant's Exhibits, is that correct?

A. Yes.

Q. During that time no change was made in that stick up to the time the photograph was made?

Mr. Gillen: Just a minute. I don't understand there is any stick that is Plaintiff's Exhibit.

Mr. Thompson: No, I corrected that and said Defendant's Exhibit.

Mr. Gillen: I don't understand any stick that is shown in Defendant's Exhibit.

Mr. Thompson: It is shown in Defendant's Exhibit.

Mr. Gillen: I challenge the record.

The Court: Read the question.

Q. (By Mr. Thompson): During the time you were there, this stick which is on Defendant's Exhibit, was any change made in that [347] during the time you were there? A. No, sir.

Q. The picture was taken while you were there, in your presence? A. Yes, sir.

Q. Calling you attention to Defendant's Exhibit

(Testimony of Alfred C. Jacobson.)

B for identification, the motorcar shown there, had you seen that before?

A. It appears to be the same motorcar that was in this accident.

Q. There is shown there a yardstick; of course, that wasn't on the car when you saw it, is that correct? A. That is correct.

Mr. Thompson: We will offer in evidence Defendant's Exhibit B for identification, if it please the Court.

Mr. Gillen: May I find out what counsel is doing now? I understood counsel to say he was withdrawing something.

Mr. Henderson: No, offering B in evidence.

Mr. Gillen: Offering this entire exhibit in evidence?

Mr. Henderson: Yes.

Mr. Gillen: To which the plaintiff offers the objection because the pictures are posed or set-up pictures, having objects in the pictures and figures in the pictures that might misrepresent them.

The Court: They are admitted. [348]

(Defendant's Exhibit B in evidence.)

Q. (By Mr. Thompson): Calling your attention now particularly to Defendant's Exhibit D-4, will you give the numbers of those exhibits, Mr. Jacobson? A. D-1, D-2, D-3, D-4 and D-5.

Q. Do those all show the picture of the same motorcar? A. It appears to be.

(Testimony of Alfred C. Jacobson.)

Mr. Thompson: We offer those, D-1 to D-5, in evidence, if it please the court.

Mr. Gillen: I thought they were in evidence already. I thought the Court just admitted them.

The Clerk: No, this is a different page.

Mr. Gillen: Same objection. Also the further objection that the witness expresses uncertainty as to whether or not it was the motorcar involved in the accident.

The Court: They are admitted.

(Defendant's Exhibits D-1 to D-5 in evidence.)

Q. (By Mr. Thompson): Calling your attention to Defendant's Exhibit D-4 in evidence, Mr. Jacobson, I will ask you to examine that picture; and it shows the brake rod about which you have testified, is that right? A. Yes, sir.

Q. Now, will you tell me how high is that or the distance between the top of the brake rod and the floor of the car, or measuring downward, how far downward the extension from [349] the bottom of the deck of the car to the bottom of the brake rod?

A. It is a space of about three-eighths of an inch.

Q. What is the diameter of the brake rod itself?

A. That is a seven-eighths inch rod.

Q. So the over-all distance between the lowest part of the brake rod and the bottom of the deck would be about what?

(Testimony of Alfred C. Jacobson.)

A. One and a quarter inches.

Q. Now, running parallel, is there an angle iron that extends across the car from side to side in close proximity to that brake rod?

A. Yes, sir.

Q. Would you give us the dimensions of that angle iron?

A. That is one and a half by two and a half angle iron.

Q. Which is the longer way of the angle iron, that which is bolted to the bed of the car or that which extends downward?

A. That which extends downward.

Q. With reference to the front or back of the motorcar, where is that angle iron placed, taking the front end of the motorcar, is it toward the front or is it behind the brake rod?

A. It is toward the front from the brake rod.

Q. It is how close to the brake rod?

A. About three and a half inches. [350]

Q. Now, will you give us the diameter of the wheels, can you, of the motorcar such as this was?

A. That motorcar carries wheels fourteen inches in diameter.

Q. And what is the height of the flange on the wheel?

A. Approximately, an inch and a quarter.

Q. What is the distance above the center of the wheels to the bottom of the deck of the motorcar, can you tell us?

(Testimony of Alfred C. Jacobson.)

A. Well, that is approximately an inch or an inch and a quarter.

Q. When the motorcar is on the rails such as on the main line, how much clearance is there under the motorcar to the top of the ties or ballast?

A. From fifteen to sixteen inches.

Q. That is, the closest clearance would be fifteen or sixteen inches above the ties or ballast, is that right? A. Yes.

Q. With reference to this wood that you found under the brake rod measuring from the flanges, how far would it have been in from those flanges, Mr. Jacobson?

A. From fourteen to sixteen inches.

Q. And again now, talking about the car, looking at the car going forward with the engine being considered as the front, where was the wood with respect to that, on which side, the left side or right side of the motorcar?

A. Facing in the same direction, sitting on the car and [351] facing toward the front of the car, it would be on the right hand side.

Q. And approximately fourteen to sixteen inches from the flanges, is that right?

A. That is right.

Q. Now, what is the width of the motorcar between the flanges?

A. Four feet, eight and a half inches.

Q. What is the gauge of the rails, Mr. Jacobson, do you know?

(Testimony of Alfred C. Jacobson.)

A. The gauge, well, four feet, eight and a half.

Q. So that would be measuring from the outside of the flange to the outside of flange?

A. That is right.

Q. The flanges are approximately how thick?

A. Approximately an inch.

Q. This stick you say was shown you by Mr. Ward which you say is portrayed in one of the photographs, what became of that, if you know, Mr. Jacobson?

A. I don't know.

Q. Where was it when you last saw it?

A. In the toolhouse at Willcox.

Q. What if any instructions were given with respect to it?

Mr. Gillen: Objected to as calling for hearsay.

The Court: You may answer, if you know. Tell what you [352] know.

A. I instructed that the stake and motorcar be locked up in the toolhouse.

Q. Did you give an instruction further than that for its disposition?

A. No, sir.

Mr. Thompson: I believe that is all.

Cross-Examination

By Mr. Gillen:

Q. Who specifically did you instruct to lock the motorcar that was represented to you by Mr. Ward as the car involved in the Schnee accident and the stick that was handed to you by Mr. Ward, to be locked up in the toolhouse?

(Testimony of Alfred C. Jacobson.)

A. It was either Mr. Ward or I locked it up myself.

Q. What?

A. Mr. Ward was there. It might have been Mr. Ward I instructed or I might have locked the tool-house myself.

Q. You answered a moment ago when the counsel asked you what instruction, if any you gave with regard to that stick, and you said, "I instructed that the stick and motorcar be locked in the tool-house"? A. Yes, sir.

Q. Now, I am asking you who you instructed?

A. Probably, I might have used the expression, "Let's lock it up and keep it here." [353]

Q. Is it your testimony now you didn't instruct anybody?

A. No, I am quite positive at that time Mr. Ward was there and I am quite sure he heard my expression, we wanted the motorcar and stick locked up.

Q. Mr. Jacobson, did you or did you not instruct someone to lock the motorcar and the stake in the toolhouse; if you did, I want to know who?

A. The only person I can recall being there at that time was Mr. Ward. I am pretty sure he was there and naturally, we wouldn't leave the motorcar out on the track or driveway, we would put it away in the toolhouse.

Q. Did you ever have that stick chemically analyzed? A. No, sir.

(Testimony of Alfred C. Jacobson.)

Q. Did you ever have anybody that knew wood to compare the splinters, the fibers I believe you call them rather than splinters, you found out on the tie compared by a person expert or experienced in wood, wood fibers and so on, compare it with the stick? A. No, sir.

Q. Is it my understanding of your testimony, outside of seeing the stick on August 30, 1946, at the toolhouse at Willcox you never saw it or had it in your hand again? A. That is correct.

Q. Sir? A. Yes, sir. [254]

Q. You considered that a very important piece of evidence, did you not?

A. I wasn't thinking of it as evidence.

Q. You knew the Claims Department would be on the job, did you not, with a man so badly injured as Mr. Schnee?

A. Naturally, and that is why we kept it there for his examination.

Q. You knew the Claims Department would want to know all about the details of it, anything that would throw any light on the accident?

A. Yes.

Q. What did you do with the fibers you found out on that tie, throw them away?

A. You mean the fibers that were in the tie?

Q. You saw those photographs with the circle around it? A. Yes.

Q. You saw that particular tie, did you not?

A. Yes, sir.

(Testimony of Alfred C. Jacobson.)

Q. When you were with Mr. Lyons, the Assistant Division Engineer? A. Yes.

Q. Are you the one that retrieved the fibers from the tie?

A. I didn't take all the fibers out of the tie.

Q. Did you take any of them out, one, two?

A. I believe I explored with a penknife to see if the fibers [355] protruded out of the tie.

Q. They were fibers, not splinters?

A. They were splinters of wood.

Q. How big?

A. They had the appearance of having been broken off the end of a stick.

Q. I asked you how large, how big?

A. The splinters, they had the appearance of being about an inch long and the hole was packed full of these splinters.

Q. How deep a hole?

A. I didn't explore to the bottom of the hole, but I would guess an inch or so.

Q. Inch or so deep? A. Yes.

Q. How many splinters?

A. It was practically filled.

Q. Did you count them?

A. No, I didn't count them.

Q. How round was the hole?

A. I wouldn't call it exactly round.

Q. What was the circumference of the hole?

A. The hole had the appearance of a pointed stick having been driven into the tie.

(Testimony of Alfred C. Jacobson.)

Q. I didn't ask you that, Mr. Jacobson. Will you please read Mr. Jacobson the question? [356]

(Question read.)

A. The hole might have been an inch wide, say from three-quarters to an inch wide and possibly three-quarters of an inch high.

Q. You and Mr. Lyons there alone at that time, is that correct?

A. I don't recall whether there was anyone else there or not.

Q. Did you have a photographer there?

A. Not the first time I was out there, no.

Q. The first time you were out there was the occasion with Mr. Lyons, is that correct?

A. That is correct.

Q. Did Mr. Lyons go over to the toolhouse with you at Willcox?

A. I can't be sure. I don't know. I can't remember that.

Q. Is it my understanding you went out on one occasion with a photographer?

A. Within an hour or two possibly after lunch, I don't recall.

Q. You went out with a photographer?

A. Yes.

Q. Located the same tie? A. Yes, sir.

Q. And took a picture? [357] A. Yes, sir.

Q. All right, now you consider that significant, and the Assistant Divisional Engineer considered it significant as an indication of something connected with the accident, isn't that correct?

(Testimony of Alfred C. Jacobson.)

A. I considered it significant.

Q. Yes. You saw the photographs that were finally taken? A. Yes, sir.

Q. Of that tie. Did you disturb the surrounding ballast to get that photograph?

A. It was crushed rock ballast. I don't recall disturbing it.

Q. You note in the picture the ballast is dug away from that particular portion of the tie?

A. Yes, sir.

Q. Did you do that or did the photographer do it in your presence?

A. I am under the impression that is the way we found the ballast.

Q. That is the way you found it?

A. Yes, sir.

Q. You noted in that picture, that picture shows the tie with a hole dug in it with no splinters or fibers protruding from it that are discernible, didn't you? A. No, I can see some fibers there.

Q. Can you? May we see the pictures? I would like you to indicate, if you would, whether there is anything in this tie but what appears to be a hole dug out that looks like freshly dug out of the side of the tie?

A. That white portion that can be seen there are the ends of the splinters that are broken off.

Q. The white portion that can be seen?

A. Yes.

Q. Is it not a fact that you took your penknife

(Testimony of Alfred C. Jacobson.)

and dug all of the fibers or splinters out of the tie?

A. No, sir.

Q. If Mr. Lyons testified he watched you do that he would be mistaken?

A. I used my penknife to assure myself——

Q. Will you answer my question?

Mr. Thompson: I object to that on the ground—do what?

The Court: Go ahead and answer the question.

A. Yes, if he said I dug all the fibers out, I believe he is mistaken.

Q. Did you dig some of the fibers out?

A. Yes, I dislodged some of them to be sure the fibers were endways in the tie.

Q. What did you do with them when you dug them out?

A. I think there might be some laying here on the ballast; just dug them out to assure myself the fibers were endwise. [359]

Q. What did you do with the fibers you dug out?

A. I left them right there.

Q. I thought you said you took them back and compared them with the stick, to those in the stick?

A. I spoke about the splinters and stick on the underside of the motorcar.

Q. If Mr. Lyon testified you took those splinters with you, would you say he was mistaken about that?

Mr. Thompson: I object to that on the ground there is no such testimony.

(Testimony of Alfred C. Jacobson.)

Mr. Gillen: I will stand on the record.

The Court: Answer it again.

A. I think he would be mistaken.

Q. Was there any hearing held regarding this accident?

A. Not that I know of, that is a formal hearing I presume you are referring to?

Q. Yes, formal hearing such as is usually held in regard to an accident?

A. Not to my knowledge.

Q. You never attended a such hearing?

A. No, sir.

Q. You were called upon to state to the Claims Department or assist the Claims Department to the extent you had knowledge on the subject?

A. That is right. [360]

Q. That was Mr. Caldwell, I take it?

A. I recognize Mr. Caldwell as having seen him at that time. And I am quite sure it was him.

Q. By the way, you now reside at Oakland, California? A. Yes, sir.

Q. You were brought down here for this trial?

A. Yes, sir.

Q. You hold what position in Oakland?

A. Signal Supervisor at Oakland, the same as I had here at the time.

Q. Was any inquiry ever made of you about the whereabouts of the surveyor's grade stake by anyone?

A. Yes, I recall the question being raised; I

(Testimony of Alfred C. Jacobson.)

can't recall by whom. And I endeavored to have it located, but I was unable to.

Q. When was that?

A. Well, I believe it was possibly two or three weeks after the accident.

Q. When you examined the car that day and had the photographs taken of the motorcar, were you the one that caused the motorcar to be tagged?

A. I don't recall that. I can't recall it.

Q. Do you recall there was a tag put on the motorcar, "Schnee accident"?

A. No, I can't recall that. [361]

Q. Do you recall any request to have the motorcar forwarded from Willcox to Tucson?

A. Logically, those instructions would probably come from me.

Q. Mr. Jacobson, do you recall such a thing?

A. No, I don't recall.

Q. Do you know whether the car ever got to Tucson or not?

A. Yes, sir.

Q. How do you know that?

A. Because I looked at the car at Tucson again.

Q. When you looked at the car at Tucson, did it have a tag on it that said, "Schnee accident"?

A. I recall seeing a shipping tag on it. I don't know what it had on it.

Q. You didn't have that placed on or didn't instruct anybody to have that placed on?

A. I don't recall.

Q. That was equipment under your direct supervision?

A. Not direct supervision.

(Testimony of Alfred C. Jacobson.)

Q. You were boss of that whole Signal Department, weren't you? A. Yes, sir.

Q. You don't know why there wasn't a tag put on the grade stake, "Schnee accident," and why that wasn't forwarded with the motorcar, do you?

A. No, I don't.

Q. All you remember was some subsequent time someone whom you don't know inquired about the stake?

A. It was called to my attention the stake was missing.

Q. And you tried to find out something about it and couldn't? A. Yes, sir.

Q. How did you go about trying to find out something about it?

A. Well, sir, it is very vague in my mind just what we did. I can't recall it with certainty.

Q. You can't recall it? A. No, sir.

Q. Let me ask you this question: Is it not a fact on August 30, 1946, Mr. Ward was on vacation with pay, and Mr. Ward was packing and preparing to move to another section?

A. I don't recall whether he was on vacation with pay. He was packing to move, yes.

Q. Isn't it a fact that Mr. Ward informed you that he was leaving for another district and that the entire matter would be left in your hands as the boss of the Signal Department?

A. I think he was probably leaving at my instructions to another job.

(Testimony of Alfred C. Jacobson.)

Q. The question is: Isn't it a fact that he called you [363] since he was leaving, he would leave this evidence with you?

A. He may have, but I don't recall that.

Q. Was there any reason why you didn't take precautions yourself to tag that stake or bring it into your own office and lock it up?

A. The only reason would be that I expected additional investigations would be made on the grounds by others.

Q. You have been railroading long enough to know if there is such a thing as a broken grab iron or broken wheel, broken brakeshoe involved in a case or any piece of equipment broken, that is put away, cached away for the inspection and other use by the investigation forces of the railroad, isn't that so?

A. That is right.

Q. Do you know why such precautions weren't taken about the grade stake?

A. To my knowledge the grade stake was locked up in the toolhouse when I left there; I assumed it would be safe there and would be returned with the motorcar to the shop.

Q. You cannot tell us now who tagged the motorcar and sent it to Tucson?

A. I don't recall that, no.

Mr. Gillen: I think that is all.

Mr. Thompson: At this time, might the exhibits be shown to the jury. [364]

The Court: Better not now.

(Testimony of Alfred C. Jacobson.)

Redirect Examination

By Mr. Thompson:

Mr. Gillen: On Defendant's Exhibit C-1 and C-2, you have an arrow pointing in ink or a line showing that stick or stake which he says was exhibited to him by Mr. Ward—those are the exhibits for identification?

Mr. Thompson: No, those are the exhibits in evidence.

Mr. Gillen: No. If those are in evidence, they got past me, because I wished to be heard on that. I must have been asleep at the switch when these were offered in evidence.

The Court: I will hear you now.

Mr. Gillen: I offer an objection to the admission in evidence of Defendant's Exhibit C-1 and of Defendant's Exhibit C-2. I have no objection to Defendant's Exhibit C-3. My objection to the admission in evidence of C-1 and C-2 is that both pictures include in the photograph an object which has been partially identified as being a very important and vital exhibit in this case concerning which no proper showing has been made of the efforts made to obtain such exhibit, which would be the best evidence. I submit it is a violation of the best evidence rule without a showing of the impossibility of obtaining the particular original exhibit so that the Court might in its discretion or the Court to exercise its discretion to permit some

(Testimony of Alfred C. Jacobson.)

secondary evidence. The [365] importance of it also, may it please the Court, there has been some testimony of certain markings of certain chemical effects on the wood. I think it would be of vital importance to determine from seeing the original exhibit rather than depending on a photograph. I don't know whether Your Honor has in mind the particular two exhibits and the particular object. The objects in one instance are held in an unidentified person's hand because only the hand and arm shows; in the other exhibit it is propped up against apparently the axle under a motorcar which is standing on tracks. I would like Your Honor to see those.

The Court: I have no reason for looking at exhibits now. I haven't looked at any exhibits. They are admitted. Show them to the jury.

(Defendant's Exhibits C-1, C-2 and C-3 in evidence.)

Mr. Thompson: I have not yet offered Defendant's Exhibit G in evidence, which is the statement the plaintiff says he signed on September 3, 1946, about which the witness Caldwell and Mrs. Stevens testified.

Mr. Gillen: Without taking too much time of the Court, I want to offer the same objections I have two similar exhibits.

The Court: Same ruling, provisionally admitted. Are you through with this witness?

Mr. Thompson: Yes.

(Testimony of Alfred C. Jacobson.)

The Court: Do you want to question about the marking? [366]

Mr. Gillen: No, he just identified the stick with ink, Your Honor.

Mr. Thompson: If it please the Court, I think that concludes our witnesses with the exception the desire to ask a question or two of the plaintiff Schnee. Of course, I want the opportunity to inquire about these exhibits. I understood the Court hadn't yet permitted those to such an extent I can refer to the contents.

The Court: Defendant rests as to liability. You can begin your rebuttal when we come back in ten minutes, gentlemen.

(A ten minute recess.)

The Court: Proceed, Mr. Gillen. This is rebuttal on the question of liability.

ALMA TENDLER

called as a witness herein by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your name, please?

A. Alma Tandler, known as Bonnie as a nickname.

Q. What is your address, please?

A. 319 West Kings Road.

(Testimony of Alma Tendler.)

Q. In Tucson? A. Tucson, Arizona. [367]

Q. Are you employed, Mrs. Tendler?

A. Yes, sir.

Q. What is the nature of your employment?

A. I work for the City Laundry.

Q. In what capacity? A. In the office.

Q. Are you acquainted with Mr. Schnee, the plaintiff in this action? A. Yes, sir.

Q. Also with his wife, Mrs. Beatrice Schnee?

A. Yes, sir.

Q. How long have you known them?

A. Close to six years.

Q. Friendly with them all during the time they were residents of Tucson? A. Yes, sir.

Q. And when Mr. Schnee was working on the railroad? A. Yes, sir.

Q. Do you have a recollection of it coming to your attention on August 29, 1946, that Mr. Schnee had been seriously injured in an accident on the railroad? A. Yes, sir.

Q. At that time do you recall the Schnees had been living for a short time in Willcox by reason of his transfer there? A. Yes, sir. [368]

Q. Did you see Mrs. Schnee that night?

A. You mean the night of the accident?

Q. Yes.

A. Yes, sir, in the morning after she had come from the hospital.

Q. About what hour in the morning was that?

A. I would say, two or three o'clock in the morning. It was quite late.

(Testimony of Alma Tendler.)

Q. Did she remain at your house?

A. Yes, sir, she did.

Q. Throughout the time that Mr. Schnee was in the hospital, did Mrs. Schnee remain at your house?

A. Yes, sir.

Q. As a guest of your husband and yourself?

A. Yes, sir. She has a trailer parked on a lot there that was at her disposal.

Q. Following the 29th, did you at any time go to the hospital with Mrs. Schnee to visit Mr. Schnee?

A. Yes, sir. Not the first evening, but I believe the second evening after the accident, I went with Mrs. Schnee.

Q. How often thereafter did you go with her?

A. Well, quite often, maybe every other day, sometimes every day. It all depended on the way my work was going; if I could go with her, I did.

Q. For the first three weeks, can you tell us what if [369] anything during the visits you made there as you have described it, sometimes every other day and sometimes every day, for the first three weeks, can you tell us what if anything you observed about the condition of Mr. Schnee physically and mentally?

A. At first Mr. Schnee didn't know me at all.

Q. Didn't know you at all? A. No, sir.

Q. How long had he been acquainted with you up to that time?

A. From the time we were in Tucson which was about five years—no, we were here six years. He

(Testimony of Alma Tendler.)

had known me at least three years at the time of the accident I mean.

Q. For the first while he didn't know you. How long would you say that continued?

A. I know I made three, maybe four visits or more to the hospital before he seemed to recognize me, and after that there were times when he wasn't too sure, I don't believe, there was someone there.

Q. Can you tell us what gave you that impression? Is it anything he said or did or anything in the way he looked that gave you the impression there were times after that he didn't appear to recognize you?

A. At first he just laid there more or less. He was completely bandaged. I always said I could only see his nose. That is all I saw practically and he didn't make any [370] observations.

Q. Didn't talk? A. Didn't talk.

Q. Did he make any sounds that indicated anything to you at all?

A. He would sort of groan like he might have been in pain at different times.

Q. Was there anything else about him that caused you or that indicated anything to you about his condition either physically or mentally?

A. No, only he didn't remember all the time even after he knew us. Sometimes she would say something, then maybe five minutes or so he would ask that same question over again.

Q. Now, do I understand you that you would tell

(Testimony of Alma Tendler.)

him something or answer a question of his and about maybe five minutes later he would ask you for the same information again? A. Yes, sir.

Q. Is that so? A. Yes, sir.

Q. How long, if you can tell us, did that continue with regard to the mental aspect of Mr. Schnee?

A. Well, I wouldn't like to say a definite time.

Q. Your best recollection. Tell us if it is your best recollection?

A. It would be over a period of time, say, about three or [371] four weeks, maybe longer than that.

Q. Three or four weeks and maybe longer than that? A. Yes.

Q. What did you note about his physical appearance other than what you described, his head was swathed in bandages and you only could see his nose; what else did you observe about his physical appearance? Did you observe any other part of his body?

A. Well, after we had been there a number of times, of course, we looked at the cast on his leg and his hand, things like that, but I didn't do that at first.

Q. Then, after three or four weeks there, did you notice any change in his mental capacity?

A. Well, he seemed to know us then and to talk more freely.

Q. Did he appear to have greater or less pain or any at that time?

(Testimony of Alma Tendler.)

A. He didn't appear to have more pain.

Q. And do you recall his being transferred from St. Mary's Hospital to the Southern Pacific Sanatorium?

A. Yes, I do.

Q. Did you visit him there also?

A. Yes, sir.

Q. By the way, during the first couple of weeks you visited there with Mrs. Schnee, what if anything did you observe Mrs. Schnee do on those visits with relation to Mr. Schnee? [372]

A. She didn't do much of anything only go by his bed and sat there, maybe hold his hand, something like that. Of course, I didn't stay in the room all the time. I would go in the room and stay for a little bit, go back out again, sort of give them a little privacy.

Mr. Gillen: I think you may cross-examine.

Mr. Thompson: No questions.

MRS. BEATRICE SCHNEE

called as a witness herein by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your full name?

A. Mrs. Beatrice Schnee.

Q. You are the wife of the plaintiff in this action, A. J. Schnee?

A. That is right, sir.

(Testimony of Mrs. Beatrice Schnee.)

Q. How long have you and Mr. Schnee been married?

A. Since August 10, 1943—it was July, I am sorry.

Q. Mrs. Schnee, directing your attention to August 29, 1946, where were you residing at that time?

A. Willcox, Arizona.

Q. Did it come to your attention on that date your husband had been injured in a railroad accident?

A. Yes, sir. [373]

Q. And did you see your husband in Willcox that day?

A. Yes, sir.

Q. Where did you see him?

A. I saw him in front of the doctor's office in Willcox just before they put him in the ambulance.

Q. Did you know whether he was conscious or unconscious?

A. Well, he was semiconscious, I would say. By that I mean, well, he recognized me then.

Q. He recognized you?

A. Yes.

Q. Did you follow the ambulance to Tucson?

A. Yes, I did.

Q. Approximately what time of day did you arrive in Tucson?

A. We arrived in Tucson about nine that evening.

Q. Nine o'clock at night?

A. That is right.

Q. Where did you go?

A. Went to the Southern Pacific Hospital.

Q. Went to the Southern Pacific Hospital?

(Testimony of Mrs. Beatrice Schnee.)

A. That is right.

Q. What if anything happened there?

A. When I got there, they were getting ready to take him to St. Mary's Hospital.

Q. Do you know why?

A. I don't know whether it was a doctor or interne that [374] told me they didn't have facilities to take care of him, they were taking him over to St. Mary's and wait for Dr. Francis to meet them.

Q. Dr. Francis was the Southern Pacific Surgeon? A. That is right.

Q. Did you know Dr. Francis up to that time?

A. No, sir.

Q. Did you follow the ambulance to St. Mary's Hospital? A. That is right.

Q. Arriving at St. Mary's Hospital, what if anything did you do?

A. The first thing I did the nurse had me sign the register admitting him, also authorize Dr. Francis to do any work.

Q. Had you sign authorization for surgical care?

A. Yes, that was in on that form.

Q. Then, what happened?

A. Then, it was just a question of waiting. There wasn't much else to be done.

Q. Was your husband taken to surgery?

A. That is right.

Q. Where did you wait?

A. Outside in the anteroom.

Q. Outside the surgery? A. Yes.

(Testimony of Mrs. Beatrice Schnee.)

Q. At any time under any circumstances were you taken into the surgery? A. Yes, sir.

Q. Who brought you into the surgery?

A. Dr. Francis.

Q. Was there anything said about his admission into surgery?

A. Dr. Francis came out to me and said, "Mrs. Schnee, your husband is calling for you; I think you ought to come in, and I think it would be best you do." I went in and stayed a few minutes, and he said, "Now, you have to leave." That is all.

Q. How long, if you know, did Dr. Francis work on him in surgery that night?

A. The best I can remember so far as time goes, it was probably about ten o'clock when we got to St. Mary's and it was after one when they wheeled him by me out of the operating room.

Q. Did you go into his room with him?

A. I went up to his floor and they made me stay outside until they got him in bed and the nurse said when they got him in bed, they would let me come in.

Q. Did you see him after they got him in bed?

A. Yes.

Q. Was he conscious or unconscious?

A. Unconscious.

Q. What did you do?

A. The nurse said, "You can stay here a few minutes; the best thing you can do is leave." He was in an oxygen [376] tent. He was apparently

(Testimony of Mrs. Beatrice Schnee.)

out, no movement, perfectly still, just laid there and I left shortly after that.

Q. Did you notice anything about an oxygen tent at that time?

A. Oh, yes, he was under an oxygen tent.

Q. What time did you leave the hospital?

A. It was about 2:30 or 3:00, somewhere in there.

Q. Did you receive any instructions or advice from anybody about when you might next visit your husband?

A. Yes, the nurse told me to call in the morning, preferably about nine o'clock and for me not to come to the hospital; told me it wouldn't be of any use, and he would be in that kind of condition, they didn't know how long, and the best thing was to call and they would let me know when I could see him, which I did the following morning.

Q. When you did call, what information did you receive by way of instructions when you could see him?

A. Naturally, I asked about his condition and they said it was the same and I shouldn't come and should wait until maybe evening.

Q. That was on August 30th, you received the information his condition was the same and not to come until evening. A. That is right.

Q. Did you call again in the evening?

A. No, I didn't, I went right out there. [377]

Q. Were you accompanied by anyone at that time?

(Testimony of Mrs. Beatrice Schnee.)

A. Yes, an old friend of ours, Mr. Myart, went with me.

Q. Is he a man whose family resides here?

A. Yes, sir.

Q. His wife and son reside in Tucson?

A. Yes, sir.

Q. When you arrived there at the hospital in your husband's room, what if anything did you observe?

A. Mr. Myart is an excitable man; as soon as he got to the door he started to cry, and he said, "Oh, my God, that poor boy." The first thing I saw was the cast on his legs and the oxygen tent. By that time the nurse came and pulled us away from the door and gave us a good dressing down for making a scene and told us to leave.

Q. Were you permitted to visit your husband?

A. No, she wouldn't allow it. She told us to leave.

Q. When did you next see your husband?

A. That was the following day.

Q. August 31st? A. That is right.

Q. What time did you go to the hospital that day? With whom, if anybody?

A. I went about 1:00 o'clock, time for visiting hours, whatever the time was. I don't remember now, but it was the afternoon. They had given me a card stating what the [378] hours were, and I know I got there before visitors were allowed upstairs and I sat in the anteroom. I was alone then.

(Testimony of Mrs. Beatrice Schnee.)

Q. Did you finally get up to your husband's room? A. Yes.

Q. In what condition did you find him at that time?

A. About the same. He wasn't conscious of me and I went over to his bed. I just sat down and just looked at him. There wasn't anything I could do or to say to him. They told me just let him know you are here. I went over to him and said, "I am here. This is Beatrice, honey," and he just turned over and looked at me and that was all.

Q. Did you see him any more that day?

A. Yes, I went out that night.

Q. With whom?

A. I think Bonnie went with me that night.

Q. By Bonnie, you mean Mrs. Tendler?

A. Yes.

Q. What did you observe about him that night?

A. I went over to the bed and sat down like I did in the afternoon and took his hand and sat there. Bonnie stood at the foot of the bed. He didn't seem to know we were in the room or anything. He looked and acted not coherently at all. He just laid there. I said to him that Bonnie is here; I remember he gave me a little pressure on the hand, that is all. Bonnie shook her head like this (indicating) to me, and [379] I sat there and later his hand seemed to try to tell me something. I took it and squeezed it and he just was lying there. It was pathetic. He couldn't do anything, just move his

(Testimony of Mrs. Beatrice Schnee.)

head a little bit, he was confined so with all these casts and bandages. He looked at me and smiled a little bit and that was the first time I think he realized I was there.

Q. When did you next see him?

A. The following afternoon.

Q. Did he talk on that occasion when he smiled?

A. The following day he did know I was there. He said, "Hello," if I remember correctly. He gave me some remarks, but the whole time I just mainly sat there and watched him, asked him how he felt. He naturally didn't say too much to me.

Q. For how long did that continue that condition you have described?

A. Well, as the days went on, he would know me and talk to me and ask me little questions now and then, but the following days he wouldn't know I had even answered them.

Q. What days would you say that?

A. Well, for instance, he asked me where I was staying, something like that. I told him it is all right, I am at the trailer at Bonnie's. Then he seemed satisfied and he would go off like in a daze, asleep, then maybe that evening he would ask me the same question again, things of that sort. [380]

Q. Ask you where you were staying?

A. Yes.

Q. Can you give us any other examples that you can recall of that nature?

A. He did say one time, "It is a long trip from

(Testimony of Mrs. Beatrice Schnee.)

Willcox back and forth." I said, "Well, I am here in the city." He asked me if I was at a hotel, and I repeated again I was at Bonnie's. It went on, things of that sort. One time he asked me if I had gotten my things.

Q. Meaning what, if anything?

A. We had all our belongings up at Willcox, all our personal belongings and I had told him on the previous occasion I had gone up there and gotten my things.

Q. You had told him you had gotten your things? A. Yes.

Q. How many times did he ask you if you had gotten your personal things from Willcox after you had told him? A. Twice he asked me that.

Q. How long did the condition exist where he appeared to recognize you and would ask you questions, then appear to forget what answers you had given and ask you those questions over again?

A. I would say up to the time, it was eight or ten days, they removed the bandages; then, he had more freedom of his head and jaw muscles. [381]

Q. When they removed the bandages from his head? A. Yes.

Q. Can you give us an idea, if you have to use gestures to do so, how his head was bandaged?

A. The bandage came just a little above the eyebrows and down this way toward his chin. The reason for that the doctors informed me his scalp was so badly mutilated they kept it tight to keep it

(Testimony of Mrs. Beatrice Schnee.)

altogether, the stitches and everything. It was very tight around his jawbone here.

Q. You say approximately ten days after that, they removed the bandages? A. That is right.

Q. Of the head? A. That is right.

Q. Did the bandage and cast remain on the hand and legs? A. Oh, yes.

Q. When they removed the bandages, what change did you notice in his condition, if any?

A. It wasn't a case of me going over and trying to make him realize I was there. When I would walk in, he would see me and his eyes would focus, in other words, and he knew. That is the first thing I noticed when I walked in.

Q. Anything about his recollection or ability to carry on a conversation?

A. Yes, it was much improved. He didn't keep repeating [382] himself and asking questions over again as he had been doing up to that time.

Q. Was there any time you recall something was said about a special shampoo that you went out and bought?

A. Yes. One of the nurses told him about Minipoo, I believe it is. It is a dry powder shampoo.

Q. You were told by the nurse to get the shampoo? A. Yes.

Q. And did you? A. Yes.

Q. Do you recall anything about the shampoo being given?

A. Yes, because the afternoon after I bought it

(Testimony of Mrs. Beatrice Schnee.)

I walked in and the nurse had just finished because the preparation, the wash basin and towels were still around the bed, so she had evidently gotten through doing his scalp, cleaning it up.

Q. What did you notice about his condition on that day?

A. He was in a very good condition then, I would say. He spoke to me, he even joked a little bit and he didn't have any hair on his head and he did look quite comical, and he said, "Don't bring a mirror, I don't want to see it."

Q. His head had been shaved?

A. Yes, right around here (indicating) and it did look quite funny.

Q. How often would you say Mrs. Tendler visited the hospital?

A. You mean during the first week or all the time he was at [383] St. Mary's?

Q. During the first three weeks.

A. I would say she went on an average of three or four times a week with me, either in the evening or afternoon.

Q. You have a recollection of your husband having been transferred from St. Mary's to the Southern Pacific Sanatorium, do you remember such an occasion?

A. Yes.

Q. Can you fix the time?

A. It must have been before one o'clock.

Q. No, approximately how many weeks after the accident?

(Testimony of Mrs. Beatrice Schnee.)

A. Oh. I am trying to think. I know Dr. Francis didn't work on him for three weeks. Then, it took one operation at a time. I would say about four or five weeks, maybe six.

Q. How long, if you recall, did he remain in the Southern Pacific Sanitorium?

A. That was very short.

Q. How many days?

A. It was more than a few days, possibly a week or so, or two. I don't recall just exactly the amount of days it was.

Q. What, if anything, happened to him there that caused him to leave the Southern Pacific Hospital?

A. That was when the foot flared up. They took him then over to St. Mary's.

Q. Anything come to your attention about running any [384] temperature?

A. Yes, that was when they first got the indication the foot was flaring up. That is the indication, when it starts running a temperature, it is indication of infection. They called the doctors, of course, first and then took him to St. Mary's and they moved him in the evening because I was there when they brought him in.

Q. During the period he was at the Southern Pacific Sanitorium in Tucson, what did you observe about his condition with relation to pain or with relation to his being rational?

A. That was when his pain, I think, was really

(Testimony of Mrs. Beatrice Schnee.)

bad on that foot. There was a dispute over penicillin and it just seemed when he didn't get it—I know it was two days and the foot started swelling up right in the cast.

You could see all around and it was throbbing. You could put your hand on it; and they didn't keep any ice on it and he was in agony and pain. I couldn't stand to see him treated like that.

Q. When he was taken back to St. Mary's Hospital, how long did he remain a patient there that time?

A. He was there that night, he came there the following day and the next day he was operated on. About two or three weeks, maybe, I don't know.

Q. Was he subsequently transferred to the Southern Pacific General Hospital in San Francisco? [385]

A. St. Mary's.

Q. I mean after his release from St. Mary's?

A. No, he was brought back to the Southern Pacific Hospital in Tucson.

Q. A second time?

A. Yes. From there he was transferred.

Q. To the Southern Pacific General Hospital in San Francisco?

A. That is right, sir.

Mr. Gillen: I think that is all.

Mr. Thompson: No questions.

Mr. Gillen: That is all. I presume there will be no objection to Mrs. Schnee remaining in the courtroom now.

The Court: Yes, it was your request. She might have to be called again.

(Testimony of Mrs. Beatrice Schnee.)

Mr. Gillen: Very well, Your Honor, if there is any objection about it.

The Court: Nobody has made any objection. She may stay in the courtroom.

Mr. Gillen: I think, Your Honor, unless I have the stipulation of counsel that they be willing to stipulate she remained in the courtroom, I would rather she remain outside.

Mr. Thompson: I don't object to her staying here under any circumstances.

ADOLPH J. SCHNEE

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Mr. Schnee, you previously have been sworn and you are the plaintiff in this action. Yesterday you were shown three separate sheets of paper purporting to be statements made by you, one on August 30th to Mr. Wallace, one on—that is August 30th, 1946—one on September 3rd, 1946, purporting to have been made to Mr. Caldwell, and the third dated October 3, 1946, purporting to have been made to a Mrs. Stewart, if you recall, at the Southern Pacific Hospital. You were shown signatures which you identified as looking like yours and at least you don't challenge those as not being your signatures?

A. No, sir.

(Testimony of Adolph J. Schnee.)

Q. Let me ask you, during the time you were in St. Mary's Hospital in Tucson or the Southern Pacific Hospital in Tucson, what, if any, recollection do you have of having signed any papers of any character and what were those papers represented to you to be?

A. The first recollection I remember was this Mr. Caldwell, I believe he came in that very day; the reason I say the very day was because he mentioned of having been over to St. Mary's Hospital and that he didn't find me there, and he came down to get a hold of me. [387]

Q. Keep your voice up, please.

A. He came down to the Southern Pacific Sanatorium to see me, because he needed my signature on a little piece of paper about what they call an advance for money the company advances sometimes.

Q. That is for money the company advances for injured men during the time they are laid up, is that correct?

A. Yes, sir.

Q. Now, do you have my question in mind?

A. Well, I am pretty sure this thing—

Q. Mr. Schnee, do you have my question in mind? I asked you what, if any, papers you signed, have any recollection of signing at either of the hospitals for anybody and what were the papers represented to you to be? You have told us about one instance you recollect; were there any other papers you recollect signing?

A. Yes, sir.

(Testimony of Adolph J. Schnee.)

Q. What?

A. It was told to me that this paper—the lady came up to me. I don't remember the lady, but it appears I think I seen this lady that was in here this morning. I don't know, I am not too sure, but I remember a lady came in there and told me in transfers from one hospital to another, it is required for a patient to be admitted and upon that explanation she presented to me a piece of paper to sign, and I signed it. [388]

Q. Were there any other papers you recall signing for anybody at either of the hospitals and if so, what was represented by any of these papers?

A. Well, this Mr. Caldwell upon one occasion, it had to do with this same advance, he had me sign a slip of paper. He said it was needed for him to make a request to the main office.

Q. For him to make a request to the main office for what? A. For this advance.

Q. For an advance of money to you from the Southern Pacific Company?

A. That is right. And when he did come that second time, he told me of difficulties. I believe I asked him, I needed a certain amount of money and he said he couldn't get me that much. That is the reason he had to make a change in the requisition. He needed to get the money.

Q. Did you sign several requests for money, for receipts for money?

A. Yes, sir. I don't know just how many of them; I know there were a few of them.

(Testimony of Adolph J. Schnee.)

Q. Do you have any recollection of seeing and making a statement to or for Mr. Wallace on August 30th or at any other time as to the details of how your accident happened?

A. I do not recollect making a statement to him at any time pertaining to the accident while I was in either St. Mary's Hospital or in the Southern Pacific Sanitorium. [389]

Q. Do you recall making a statement of the details of how your accident occurred in so far as you knew how the accident occurred to Mr. Caldwell at any time?

A. Not so far as I knew. I remember making the remarks to him from——

Q. I am talking about a statement, signed statement?

A. No. I don't recollect ever seeing that form that was shown to me, that typewritten page, I never even recollect seeing it.

Q. At any time during the time you have worked at Willcox or any other place as a Signal Maintenance man, did you ever use for the purposes of stirring the solution in batteries or for any other purpose in connection with your equipment a surveyor's grade stake?

A. I don't recall using a surveyor's grade stake. The fact is when I came there to take over this job, I used the same paddle that Mr. Wallace and I used together the first day he showed me how to build the very first battery on the job at Willcox, Arizona.

(Testimony of Adolph J. Schnee.)

Q. Did you use that same paddle throughout the period of time that you served in that capacity out there and up until the time you were injured?

A. Yes, most certainly did, sir.

Q. Now, will you describe the best you can what that paddle looked like? [390]

A. It appeared to me to have come off a crate, orange crate or some kind of fruit crate, and I don't just recollect how long it was. I don't think it was, oh, probably as long as my arm, maybe a little shorter.

Q. You are talking about your full arm or your arm up to your elbow?

A. From here to here (indicating).

Q. Your forearm? A. Yes.

Q. All right.

A. Maybe about two inches, two and a half inches, maybe three inches wide, say between two and three inches wide, and I couldn't say, maybe over a quarter of an inch, maybe less.

Q. Anything else about it?

A. I think it was whittled. It was narrow on one end, I believe, to facilitate the grasping of it.

Q. For a handle? A. Yes.

Q. Do you have any recollection of at any time carrying in your motor car either on the date of the accident or any other time a surveyor's grade stake for any purpose?

A. I never did and it would be unnecessary to carry a stick of that type on my job.

Q. On the occasion you discovered this defective

(Testimony of Adolph J. Schnee.)

signal where the lightning arresters were defective and you searched [391] for the parts you required to repair and reinstall the lightning arresters, did you when you went through your equipment in searching for the parts observe the presence of a grader's stake on your motor car?

A. A grader's stake?

Q. A surveyor's grade stake, I should say?

A. No, sir, I didn't have a piece of wood on the car that particular day, the day before, the day before that and probably days before that too, because I remember sending in a report to Mr. Wallace and Mr. Jacobson saying I had gotten through with building batteries and I was going out to inspect bonding, that is wires going from one end of the rail to the other, and cleaning the switches around each siding to make sure they are clear and make proper contact. In other words, I indicated this in my next report.

Q. In other words, you had caught up on your battery building work and was carrying no equipment pertaining to the replenishing or building of batteries on the day of the accident?

A. No, because it would be absolutely unnecessary and add weight to the car, carrying any equipment that goes with making of batteries, anything like that.

Mr. Gillen: You may cross-examine.

The Court: How far was the accident from this place you had been to? [392] A. Willcox?

(Testimony of Adolph J. Schnee.)

Q. No, where you had been out there and found a broken connection?

A. About a half mile, quarter of a mile.

Q. You had about a half or quarter yet to go?

A. Yes, sir.

Cross-Examination

By Mr. Thompson:

Q. Will you mark this for identification?

(Defendant's Exhibit M marked for identification.)

Mr. Gillen: This is an application for employment. I don't know what effect it has on the liability, may it please the Court. I object to it as incompetent, irrelevant and immaterial. There is nothing in it that is material at all that I see.

The Court: Let us see what the questions are, Mr. Gillen.

Q. (By Mr. Thompson): Will you pass that to the plaintiff and I ask him to examine and tell me if that is your signature that appears on that document, Defendant's Exhibit M for identification? A. Yes, sir.

Q. When did you sign that document?

Mr. Gillen: The document speaks for itself. It is incompetent, irrelevant and immaterial. He hasn't challenged any other signature that has been shown to him here. [393]

(Testimony of Adolph J. Schnee.)

The Court: Answer the question, if you know.

A. The time when I first tried for a job.

Q. That was in July, 1946?

A. It was either the first day or two days before that or something.

Mr. Thompson: If it please the Court, we offer that part of the document that shows the signature, shows the specimen of the signature.

Mr. Gillen: To which we object. It is incompetent, irrelevant and immaterial. We have four or five signatures on purported statements which we haven't challenged.

The Court: It is admitted.

Mr. Gillen: Just the signature is offered then?

Mr. Thompson: That part of the document that has the signature.

(Defendant's Exhibit M in evidence.)

Mr. Thompson: I have no further questions.

Mr. Gillen: No further questions, Your Honor. That is all I am prepared to offer by way of rebuttal. There is one witness I would like to have the opportunity to locate, if it please the Court. We have made an effort to locate the party over the noon hour.

The Court: Any surrebuttal?

Mr. Thompson: I did want to cross-examine the defendant as to a question or two ultimately when the documents are [394] admitted, that is all I have.

The Court: Do it now.

Mr. Thompson: Then, I offer the exhibits conditionally at this time.

The Court: Do you want to do it with the defendant on the stand or do you want the plaintiff on the stand?

Mr. Thompson: I merely want the opportunity to read the exhibits to the jury. It isn't important whether the defendant is on the stand.

The Court: You rest on liability?

Mr. Thompson: Yes.

The Court: Subject to offering the exhibits?

Mr. Thompson: That is right.

The Court: Gentlemen of the Jury, come back at half past nine in the morning.

(Jury excused.)

Mr. Gillen: We have, Your Honor, some instructions we would like to put in order, instructions we intend to proffer.

Mr. Henderson: We also have a motion to renew, Your Honor.

The Court: State your motion.

Mr. Henderson: We renew our motion to the Court to direct a verdict in this case at the close of all the evidence that has been ruled on and the unconditional admissibility of the statements here. The motion is that at the conclusion of all [395] the evidence there still is no competent evidence here to prove beyond perhaps a mere scintilla which is not the rule in Federal Court, the defend-

ant has been negligent in any respect whatsoever.

The motion is divided into two parts; one of them is directed to the safety appliance part of the cause and on that ground there is no evidence whatsoever there was any violation of the Safety Appliance Act; the second portion is directed to the Federal Employees Liability Act and we say there is no competent evidence beyond the Scintilla Rule, of any inference there was any negligence on the part of the defendant here.

The Court: I want to accommodate you in this respect, Mr. Gillen, I assume you want to be heard on the admissibility of these statements?

Mr. Gillen: Yes, Your Honor.

The Court: Of course, you will want to be heard on this motion for a directed verdict. Do you want to be heard on those matters tonight or in the morning?

Mr. Gillen: I would rather, Your Honor, be heard in the morning.

The Court: On both of them?

Mr. Gillen: Yes, Your Honor.

The Court: Perhaps it would be fairer to you, as to the exhibits for you to speak tonight because I am inclined to [396] admit them. What I mean is, if you knew I was going to admit them that might make a difference in your argument for directed verdict.

Mr. Gillen: Yes, I understand.

The Court: I haven't read them. I didn't want to read them until I heard you fully.

Mr. Gillen: Yes, Your Honor; that is the reason why I wanted the opportunity if we can obtain this witness, to produce one more very short witness by way of rebuttal to attack the admissibility of the statements or at least part of the statements.

The Court: We will do it this way. I suggest we all come in at 9:00 o'clock. We will come in ahead of the jury and if you can produce the witness over night, we will hear him.

Mr. Gillen: May I make this suggestion, Your Honor? If I obtain the witness and produce him, he will be very short; my argument against the admissibility will be very short.

The Court: I think you had better figure, Mr. Gillen, that I am going to admit the documents. I know of no reason why I shouldn't. Their weight is another question. But if you have a witness at nine in the morning, we will wait until the jury comes at nine-thirty, but if your witness isn't here at nine in the morning, be prepared to argue the legal questions. [397]

(Whereupon a recess was taken at 5:00 o'clock p.m. until 9:00 o'clock a.m. Saturday, March 4th.)

(In the absence of the jury.)

Mr. Gillen: Your Honor hasn't ruled yet. I believe there was to be some further consideration.

The Court: You have another witness?

Mr. Gillen: I tried to reach the witness last night and this morning. Mr. Schnee is down at the phone trying to reach him.

The Court: I will admit these exhibits subject to the objection.

Mr. Gillen: I would like to be heard on it.

The Court: Yes.

Mr. Gillen: The jury not being present we can speak more openly.

(Arguments by counsel.)

Mr. Gillen: As to the first cause of action pertaining to the violation of the Safety Appliance Act, the plaintiff has the feeling that the evidence has failed to reveal anything that would bring his case within the realm of that act and for that reason we are quite willing at this time to stipulate to the dismissal of that cause of action.

The Court: Very well.

(Jury returns to the courtroom.)

The Court: You may read your exhibits and present your [398] pictures.

Mr. Henderson: Gentlemen of the Jury, we are reading to you at this time Defendant's Exhibits F, G and H, consisting of statements, the contents of which I will give you as best I can. Defendant's Exhibit G reads as follows:

Mr. Gillen: May I request counsel if he will describe the document as he goes along as to handwriting with reference to how it was testified to?

Mr. Henderson: All right, I will try to do it.

The printed part reads as follows: In one corner there is a little "10-36" and "S-3500," then "Southern Pacific Company Statement Relating To

Accident.....Tucson, ArizonaSheet
No. 1.....Statement of Adolph J. Schnee.....
Home address c/o S. P. Signal Dept., Tucson,
Arizona.....Occupation: Signal Maintainer....
Employer: S. P. Co.....Business Address: Tuc-
son, Arizona.....What day and what hour did
accident occur? August 29, 1946.....About
2:30 P.M.——”

The Court: Is it agreeable that the reporter
write in the material later?

Mr. Gillen: Yes, Your Honor.

The Court: He wants you to disclose who got
that statement and when?

Mr. Gillen: I had in mind this, in the body of
the [399] statement whether or not in handwriting
or the writing of Mr. Schnee. You heard Mr.
Caldwell went to the hospital on the afternoon of
the day after he was admitted and writing it and
showing it to him.

The Court: Is that the statement where Caldwell
made notes and took them home for his wife to
typewrite?

Mr. Henderson: Yes, this is the exhibit.

The Court: Was that the day after the acci-
dent?

Mr. Henderson: No, September 3rd, which
would be five days later.

The Court: All right.

Mr. Henderson: ——“Where did accident oc-
cur? About 2 miles East of Willcox. Where were
you when accident occurred? Riding motor car

(number unknown). Do you know anyone who saw accident? Please give names and addresses: No. Did you witness accident? I was injured. Give full account of your knowledge of accident: My name is Adolph J. Schnee, age 24, and I have been employed by the S. P. Co. in the Signal Department since July 1, 1946. When I first went to work for the S. P. Co. I was thoroughly instructed in the operation of the motor car by Mr. Wallace, Mr. Young, Mr. Bayless, and Mr. Curry. My duties as Signal Maintainer consist of maintenance of all automatic signal operations, [400] including recharging of storage batteries and upkeep of primary batteries and line circuits. On the morning before my injury I went East from Willcox, checking lightning and relay arresters, and returned to Willcox at noon time to have lunch. Just before one o'clock I took the motor car west as far as Hado to make my regular inspection, and then returned to Willcox and picked up the carbon discs and brass bushings and started east on the motor car to replace the lightning arresters at signal 107.72. I was traveling on the motor car, being the only person on the car, in an easterly direction and the motor car was headed west and was traveling at a speed of approximately 25 miles per hour, when, at a point approximately 2 miles east of Willcox, the accident occurred. Just before the accident occurred, I was facing in the direction of the movement of the car but was looking west watching the block signals at the east end of Willcox

as a train had pulled west out of Willcox. I was looking backwards and occasionally in the direction that the car was moving, just before the accident. I faintly recall a flash of seeing some sort of metal on one of the rails and then heard a clang and everything went black. I do not know what the piece of metal on the rail was and cannot describe it, as my recollection of this part of the accident is very vague. I do not know which rail this piece of metal was on nor the distance the car was from it when I saw it, and do not recall seeing it after the accident. I was unconscious for an [401] unknown length of time, and when I regained consciousness was lying some 20 feet from the tracks in the direction of the highway. I recall seeing the motor car on the same side of tracks that I was on, and some distance east, which I cannot estimate. I was unable to walk but crawled towards the highway. I heard one train pass by and crawled several hundred feet to the highway. A lady stopped in a car headed west, and she said for me to wait and she would get help. I did wait there, and some one came out from Willcox——”

Dated September 3, 1946.

/s/ ADOLPH J. SCHNEE.

Witness:

/s/ JOHN D. CALDWELL.

/s/ MARY JO RUSSELL, R.N.

Statement Relating to Accident

Tucson, Airzona.

Sheet No. 2

——“and picked me up in a truck. Before I was picked up in the truck, the sheriff from Willcox came out and said that he had been over to the tracks where the accident occurred. During the afternoon before the accident or the morning of the accident, I do not recall which, I rebuilt a battery on the east end and used a wooden stick which I had previously found in my outfit car, and this stick was $1\frac{1}{4}$ " x about $1\frac{1}{4}$ " and some $2\frac{1}{4}$ " long. Inasmuch as no paddle was furnished me for the stirring of the battery fluid, this was a clean stick and I used it to stir the battery fluid. After using this wooden stick I carried it in a trough on the right side in the [402] recessed part of the motor car. There is no clamp or other special place to keep this stirring stick on the motor car. There was no defect in the motor car (number unknown) which was involved in the accideint insofar as I know, but there were no scooters which are used to shove any obstruction clear of the track, on the rear of this motor car, and the ones in front of the motor car were either worn or of improper construction so they did not reach closer than one inch above the rail. I believe the sole cause of my accident was the piece of metal on the rail which caused the derailment of the motor car, rather than the derailment being caused by the stirring stick falling from the motor car. I do not know where this piece of metal came from which I saw on the track,

which caused my derailment. When I was injured I was traveling upgrade. My injuries consist of injured right foot, left knee, left hand, laceration of scalp, and two broken and one chipped teeth.

“/s/ I, Adolph J. Schnee, have read the foregoing statement of 2 pages and it is true and correct to the best of my knowledge and belief.

“Dated: September 3, 1946.

“Witness:

“/s/ JOHN D. CALDWELL.

“/s/ MARY JO RUSSELL, R.N.

“3467 So. Lundy Ave.”

That completes Exhibit G in evidence. Exhibit F in evidence, gentlemen, was the so-called Wallace Statement, taken the day after the accident, as you have heard from the witness stand, at St. Mary's Hospital, some time that afternoon and it is the so-called Form 2611 which you heard referred to here as Employee's Report of Accident. It is printed and there are several questions and answers. It reads this way:

“Division: Tucson. Nearest station: Willcox, Arizona. Name or No. of crossing: Nearest milepost: 1077. Date of accident: Aug. 29, 1946. Time of accident: 2:15 p.m. Clear, cloudy or foggy: Clear. Raining or snowing: No. Daylight, dusk or dark: Daylight. Kind of train: Train No.: Lds.: Mtys.: Tonnage in Ms.: Engine No.: Helper Engine No.: Direction: East. Speed: 25 M.P.H.

“Casualties to Persons

“Name and address: Adolph J. Schnee, S. P. Co., Signal Dept., Tucson. Age: 24. Sex: M. Married or Single: M. Nature and extent of injuries: Lacerated scalp, fractured ankle and left index finger and hand. Estimated days disability: 4 mo. Did you see the accident: Yes. Where were you when it occurred: On M-9 motor car, traveling east. [404] Detail of cause and circumstances: I was backing up motor car when I heard a clang like a piece of steel and that's the last I remember. I crawled to highway and hailed a car. They notified somebody in Willcox and truck came after me.

“Names and addresses of witnesses: No witnesses. Names and addresses of relatives or friends: Mrs. Beatrice Schnee, c/o Sig. Dept., Tucson. What was done with or for injured persons: Taken to Tucson in ambulance. By whose direction: Willcox doctor. Name and address of attending doctor: Dr. Francis. What did injured person or driver of vehicle say as to cause of accident:..... Who was present when statement was made: Could accident have been avoided: If so, how: Did any jerk or rough handling of train cause or contribute to accident: If so, explain fully: Main siding or yard track: Main. Straight or curved, right or left: Straight. Level, up or down grade: Level. In cut or on fill: Fill.”

Mr. Henderson: There are a lot of dashes, shall we just omit the rest of them?

Mr. Gillen: Yes.

Mr. Henderson: "Witness: /s/ M. O. Wallace. Dated August 30, 1946. Signed: Adolph J. Schnee."

Mr. Henderson: That completes Exhibit F. Exhibit H was only admitted partially. It was a statement taken of Mr. Schnee when he was transferred back to the Southern Pacific Hospital the first time.

"Southern Pacific Hospital Department—

Surgeon's First Injury Report.

"Station 48. Day: 10/3, 1946. Name of injured party: Adolph Schnee. Age: 25. Occupation: Signal Maintenance. Resident: Willcox. Married or single: Married. Habits: Employee, passenger or what: Employee. Date of accident: 8/29, 1946. Place: Willcox.

"1. Patient's statement as to manner of injury. If employee, state whether on or off duty: I was riding on a motor car. Motor car accidentally derailed.

"2. To what cause does patient attribute the accident and injury? If to negligence of anyone, whom? Or if to any defect in track, equipment, structure or appliance, what?

"Motor car derailed probably due to something on the track or something falling off car onto tracks.

“3. Names and addresses of witnesses: No witnesses.

“4. If insured, state how much and in what Company, and what weekly indemnity he is to receive, if any: No.

“5. Has patient previously been in good health: Yes.

“The foregoing is a true statement, to the best of my [406] knowledge and belief.

“Witness:

“M. Stewart.

“/s/ ADOLPH J. SCHNEE.”

Mr. Henderson: Then in writing, the signature “Adolph J. Schnee.”

Then, we have these photographs. I hand you the first two taken at the place of the accident. Mr. Lyons circled the place where the stick went into the tie.

(Photographs submitted to jury.)

Mr. Henderson: Defendant's Exhibits C-2 and C-1, which I am handing to the first juror, are pictures of the motor car itself and the designation by Mr. Jacobson, I think it was, of the broken part of the stick up under the car and an arrow pointing to the famous stick itself.

(Defendant's Exhibits C-2 and C-1 submitted to jury.)

Mr. Henderson: The rest of these photographs

are pictures of the car in various positions and showing measurements of the car.

Mr. Thompson: The last exhibit was the specimen of the signature admitted and only the signature. Does counsel have any objection to it being exhibited to them that way?

Mr. Gillen: Yes, we have never challenged that.

Mr. Thompson: Only the signature was admitted and is there any objection to handing it to them in that fashion?

Mr. Gillen: No.

Mr. Henderson: I hand you another exhibit which is [407] merely the signature of Mr. Schnee on his application for employment, for comparison with his signature on the three statements.

The Court: Do you have a witness, Mr. Gillen?

Mr. Gillen: I have some depositions and I have the plaintiff whom I would resume with.

The Court: All right, put him on.

ADOLPH J. SCHNEE

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Mr. Schnee, in your narration before this Court as to the sequence of events from the time you left on the fateful trip until the time you had crawled to the highway, I believe we had concluded the sequence of events at the point where you were

(Testimony of Adolph J. Schnee.)

picked up on the side of the highway, is that correct?

A. I believe I was saying something about being in the ambulance or in the room.

Q. That is right, you recall being moved and you thought it was in a dark room.

A. I don't recall whether it was an ambulance. I know it was dark in there and felt like I was being moved.

Q. Mr. Schnee, what is the next thing that you recall being clearly conscious of? I don't mean that day necessarily, the [408] first time that you felt that you clearly were cognizant of everything going on about you?

A. The first time I was conscious of my surroundings, things that were being said and people I remember seeing was on the very day that some sort of a shampoo was applied on my head and the scabs were being removed.

Q. From your head? A. Yes, sir.

Q. Whom did you see on that day that you were conscious of recognizing and talking to and so on?

A. I remember talking to my wife. I remember seeing my wife. I remember discussing the appearance of my head. I remember that the nurse was giving it to me and I recognized this nurse's voice in Court here the other day, but I don't remember her face. From that day on I had distinct recollections of my wife's daily visits. She visited twice

(Testimony of Adolph J. Schnee.)

a day, I can swear to that, I am swearing to it now. From there on she came twice a day, whenever possible and from visits the conversation brought out the visits before, succeeding visits, I mean that she referred to other visits and I wouldn't know what she was talking about.

Q. In other words, she would tell you things she had discussed on other visits and you had no recollection of discussing them with her?

A. Yes, I had occasions like that. [409]

Q. Let me ask you this: Were you conscious or do you have any recollection of the first surgical operation you underwent which I believe the record will show was on your hand, an open reduction on your left hand, were you conscious of that?

A. Yes, distinctly remember that for the reason that Dr. Francis told me, "Well, we think we can start working on you now and I think you are sufficiently out of shock."

Q. That you were sufficiently out of shock?

A. Yes, sir.

Q. May I have the St. Mary's Hospital Record, please? Now, you say you recall that first operation and Dr. Francis telling you he thought he could start working on you now because you were sufficiently out of shock, is that correct?

A. That is right, sir.

Q. Referring to Plaintiff's Exhibit 4, which is presumably the complete record, at least it has been

(Testimony of Adolph J. Schnee.)

identified as the complete record of your case from St. Mary's Hospital in Tucson, referring to page number five under the heading "St. Mary's Hospital and Sanitorium, Progress Record, Mr. John Schnee." I note the record shows over the doctor's signature "9/20/46, Open reduction of left second metacarpal with wire fixation of the fragments." That would be September 20, 1946. Does that assist you in recalling the first date of the surgical operation? [410] A. Yes, sir.

Mr. Thompson: Just a minute. Did you say in your question that was over the doctor's signature?

Mr. Gillen: Yes, the doctor's signature was on the page.

Mr. Thompson: It isn't over the doctor's signature, is it?

Mr. Gillen: The doctor has recited the same things in writing——

Mr. Thompson: The only statement was it was over the doctor's signature. As I understand, it is typewritten underneath. Do I understand you have offered this record and it is in evidence?

Mr. Gillen: It is so marked, if you remember the young lady from the hospital.

The Clerk: Yes, it is in evidence.

Mr. Thompson: All right.

Q. (By Mr. Gillen): My question in mind is that the approximate date, as you recall, that was the date of your first operation a little over three weeks after you were in the hospital?

(Testimony of Adolph J. Schnee.)

A. Yes, I remember definitely talking about it.

Q. Were you conscious of any subsequent operation, surgical operation being performed on you shortly after the open reduction and wiring of the hand?

A. After the hand, Dr. Francis told me to wait a week. [411]

Q. Wait a week?

A. Exactly a week, that is right, for an operation on my left knee or another operation on the right ankle, he said he didn't know which.

Q. He said he would do one or the other?

A. He said he would do one or the other depending on the condition. He had to remove the cast to find out the condition first.

Mr. Thompson: I object to that, without interrupting counsel constantly, the record is here and would be the best evidence. The conversation between this man and the doctor is objectionable.

Mr. Gillen: I agree the conversation would be hearsay, although the doctor was a company doctor and a representative of the Southern Pacific Company.

Mr. Thompson: If it please the Court——

Mr. Gillen: Call it hearsay, the record is here.

Mr. Thompson: ——The statement made he is a company doctor, if your Honor please, the Southern Pacific Hospital is operated by an association of employees and maintained from monies deducted from their pay. It isn't owned or operated by the Southern Pacific.

Mr. Gillen: The chief surgeon is appointed by

(Testimony of Adolph J. Schnee.)

the Southern Pacific and he appoints the staff members. We have been waltzing around with that a couple of years. [412]

Q. (By Mr. Gillen): The record indicates here that on September 25, five days after your hand operation, it was noted here, "open reduction of comminuted fracture of left patella with partial excision." Do you recall or do you have a recollection in your mind of having undergone that operation? A. Definitely.

Q. You were conscious and rational and knew that was being done at that time?

A. Dr. Francis was kind enough to explain to me——

Q. Don't say that, that is hearsay.

A. I am sorry. Yes, sir.

Q. You have just told what your mental condition was, have things recalled to you at that time, also what did happen to you. The record also shows you were transferred on October 3, 1946, from St. Mary's Hospital to the Southern Pacific Hospital; you have recollection of that, do you? A. Yes, sir.

Q. I notice Defendant's Exhibit H is dated October 3, 1946, and is on the form of the Southern Pacific Hospital at Tucson and is called, "Surgeon's First Injury Report."

I believe it will be stipulated, counsel, all the handwriting on this with the exception of the signature "Adolph Schnee," all other handwriting in-

(Testimony of Adolph J. Schnee.)

cluding the purported signature of Dr. Francis is the handwriting of Mrs. Stewart.

Mr. Thompson: That is correct, that is everything in [413] script is in her handwriting.

Mr. Gillen: Yes.

Q. (By Mr. Gillen): Do you recall signing any document upon your entrance to the Southern Pacific Hospital?

Mr. Thompson: Just a minute, if it please the Court. I understood in that phase of the case the witness was interrogated about this whole matter and gave his recollection or lack of recollection. I understand now it is to the medical phase.

The Court: I am not disposed to limit counsel. You can't draw too close a line.

Mr. Gillen: I am not going to prolong it in view of the previous interrogation and the jury having seen the statements.

The Court: Go ahead.

Q. (By Mr. Gillen): Did you tell Mrs. Stewart upon the date of your admission to the Southern Pacific Sanatorium upon transfer from St. Mary's Hospital, did you say this to her: "Patient was riding on a motor car. Motor car accidentally derailed. Motor car derailed probably due to something on the track or something falling off car onto tracks. No witnesses." Did you make any such statement to Mrs. Stewart at that time?

A. I do not recall making such a statement. As God is my witness I don't believe I did. I don't

(Testimony of Adolph J. Schnee.)

remember saying anything like that, yet I can see I might have, but as God is my witness I don't recall making such a statement. [414]

Q. Do you have any recollection of anything falling off your car? Did anybody suggest that to you?

A. That was what I was coming to. I was coming to the fact that during the course of Mr. Caldwell's visit up to St. Mary's Hospital, he at times talked about a statement he had gotten from me and he made references to it.

Q. Did you ask him to let you see that statement?

A. I don't recall whether I did or not, Mr. Gillen.

Q. Do you recall giving Mr. Caldwell a statement? A. I do not.

Q. Do you have any recollection of ever having told anybody you saw a piece of bright metal on the track and heard a clang of metal?

A. I don't recall ever saying that.

Q. Did you on the date of the accident see a piece of bright metal on the track and hear a metallic clang? A. I did not.

Q. You were transferred to the Southern Pacific Hospital and you remained there for some short period, did you? A. That is right, sir.

Q. Then what happened?

A. It wasn't but a couple of days my foot started bothering me, my right foot.

(Testimony of Adolph J. Schnee.)

Q. Describe what happened to your foot.

A. The foot swelled up. [415]

Q. Was the cast on the foot?

A. Most of it was on the foot, I believe it was split, some part of it on top removed. I know most of it was on there when it swelled up. The tightness of it began to tell and that was causing me a lot of pain.

Q. Was the pain severe?

A. I'll say it was.

Q. What happened then?

A. Dr. Francis was out of town and Dr. Schultz attempted, I believe, to get it under control by renewing the penicillin shots.

Q. You finally transferred back to St. Mary's Hospital?

A. Immediately after Dr. Francis returned, I think from a football game, he made arrangements for me and I believe I had to sign another piece of paper there for the coming operation or transfer, I don't know which it was.

Q. What happened then back at St. Mary's Hospital?

A. At St. Mary's Hospital I was operated on.

Q. Operated on in what part of your body?

A. The right ankle.

Q. Then, what was done?

A. Of course, then after that operation I stayed there and Dr. Francis attempted to get some movement in my left knee.

(Testimony of Adolph J. Schnee.)

Q. Get some movement out of your left knee?

A. Yes. You asked me before what occurred at the S. P. [416] Hospital. At that time they removed the cast on my left knee and that same day, or the day after, they removed the steel sutures on the outside of the knee, running from one side to the other. When they did that, they took me in the X-ray room and started on this job and at the same time attempted to take pictures of my right foot. They had the bed in there and two doctors, Dr. Schultz and another doctor; there were at least two or three nurses and my wife had come in there, not knowing the visiting hours and she first heard noises, that was the reason she came in there.

Q. You can't describe that?

A. I was lying in the bed with this one doctor working on my knee and pulling out the steel sutures; I was in such agony I actually got the bed sheet and bit into it. Mr. Caldwell held me down in the bed.

Q. You didn't have any anaesthetic?

A. No, sir.

Q. Can you fix the date?

A. I know it was immediately after I came from St. Mary's Hospital into the Southern Pacific Hospital.

The Court: What was the word you used, somebody held you down?

The Witness: He held my arm.

The Court: H-e-l-d, is that the word?

(Testimony of Adolph J. Schnee.)

The Witness: Held. [417]

Q. (By Mr. Gillen): Mr. Caldwell held you down?

A. And my father-in-law was on the other side on my arm.

Q. Now, Mr. Schnee, when you went back to St. Mary's, your foot was operated and Dr. Francis tried to develop any movement?

A. That is right.

Q. Were you operated any more in St. Mary's Hospital or any more in Tucson?

A. Not at any time.

Q. Was anything done about your hernia down here? A. No, sir.

Q. During the time you were in the hospitals in Tucson here, will you describe to the Jury what type of pain you suffered, if any? You have described one incident, but describe the pain you suffered from the various parts of your body that were injured.

A. My left knee was stiff and until the time they tried—of course, when they tried to get movement into it, then was when I suffered more pain than I ever did in my life. They had an orderly come in the therapy room and hold onto the top part of my leg while the nurse, I forget her last name, I think her first name was Lucy, while she attempted to get movement in this foot, and at times the pain was so terrific and that was the reason she would get this man to hold this part of my body down.

(Testimony of Adolph J. Schnee.)

Q. How long did that continue? [418]

A. That continued for a long time. It continued the last time I came back, this second trip after I returned from this operation on my foot to the S. P. Hospital again, from then on.

Q. Were you given any trouble from your foot?

A. The foot trouble has been with me constantly.

Q. What was the nature of any discomfort or pain you have had in your foot?

A. After that last operation on the foot I mentioned——

Q. I am not talking about the last operation, I am talking about from the very beginning. Were you conscious of any pain or discomfort in your foot?

A. From the very beginning the pain was such I had ice packs on there. I remember on several occasions I tried to get ice and they wouldn't have it on hand right away and the pain would be terrific; when the ice would melt and it would get warm.

Q. Was that sharp pain, dull, how? Can you describe the pain and can you describe anything different you have experienced?

A. I can say I have never had any sharp pains at any one particular spot, but it was a pressure from the inside in the ankle that was there constantly, and some of it has been with me ever since. It is like when I sprained an ankle before I was hurt, before you get it back in place it felt like it

(Testimony of Adolph J. Schmee.)

was sprained all the time. It feels like it is sprained now. [419] I want to move it and it feels like it is hooked on something.

Q. Do you have any discomfort from your head and do you retain any discomfort from your head?

A. At the very time I described at the time my wife came in there with the shampoo, I remember that then I had a pressure, a dull pain in my head, and after that I had big welts on it. When they wore down and the surface got more or less flat, I didn't have that pain any more. Lately I haven't experienced any of that except on occasions I get a sharp pain but it doesn't last long, maybe two seconds, maybe eight seconds.

Q. How often does that come?

A. It doesn't come often. It doesn't come any set time. I haven't had any now for a couple or three weeks. But before that, about three or four months ago, I used to get them more often, but I don't any more.

Q. What part of your head did you indicate?

A. I get them on both sides, on this side and the other side, and I do experience relief by putting my hand on it, incidentally, and applying pressure.

Q. Applying pressure to it?

A. That is right.

Q. Do you have ridges on your scalp and skull?

A. Yes, sir.

Q. Indentations? [420]

A. Yes, sir.

(Testimony of Adolph J. Schnee.)

Q. Can they be felt by palpation, by rubbing your hand over the head?

A. You can put your fingers on it and feel it.

Q. I don't know whether Your Honor will permit of that, but it is available for the Jury to feel the man's head. Your teeth you lost, did you have any pain or discomfort from the teeth?

A. I had discomfort after I got my teeth, but before that for a long time I had difficulty talking and I have a distinct recollection of my jaw feeling like it was out of place for the longest time.

Q. Did it make any difference in your manner of speaking? A. I should say it did.

Q. Your teeth have been replaced by artificial teeth? A. That is right.

Q. Do you have any trouble with your hand, any appreciable trouble with your hand?

A. I don't have any appreciable trouble with my hand, other than performing a twisting motion, wringing out a towel or facecloth.

Q. What sensation do you feel?

A. I have a distinct dull ache right in here (indicating).

Q. Other than that, your hand doesn't give you any discomfort?

A. Oh, yes, when I walk on crutches and apply too much weight [421] on this part of my hand.

Q. Now, prior to the time you had this accident, did you wear glasses?

A. No, sir, I didn't wear glasses in my life.

(Testimony of Adolph J. Schnee.)

Q. When did you get the glasses?

A. I got the glasses while I was lying in the Southern Pacific Hospital in California, San Francisco.

Q. Why did you get the glasses?

A. I experienced a blurriness.

Q. Blurriness?

A. Yes, sir. At a distance people would wave hello to me at the other end of the room; with my glasses off I wouldn't know who they were.

Q. Did that come on suddenly or gradually?

A. Gradually.

Q. Gradually from the time of the accident?

A. Yes. It is worse now.

Q. With regard to your knee, do you have any discomfort with that knee and describe what discomfort you did have from the beginning.

Q. The discomforts were extreme and they are still there more than ever, I believe. I have especially discomfort when attempting to get up from a seat or when attempting to lift my foot this way (indicating). I can put my hand down and I can feel a crack. [422]

Q. What the doctor calls crepitation, grinding or cracking? A. Yes, you can feel it.

Q. Do you have to balance all the weight of your body and walking activity on the left leg?

A. Well, other than the time——

Q. Other than the aid you get from crutches?

A. I attempt a lot of times to lean on my elbows or other knee.

(Testimony of Adolph J. Schnee.)

Q. You can't bear any weight on your right foot?

A. No, sir.

Q. Is your right foot still open and draining?

A. Yes, sir.

Q. Tell us about your right foot.

A. The condition of it at this time?

Q. Yes.

A. It is twisted through the inside and the heel is pushed in, it is more flat appearance in the back. All the right ankle is gone except the upper, just a part of it on the top. There is a big indentation here in the side with a hole, maybe an inch or an inch and a quarter; I don't know how deep it is.

Q. What discomfort have you had with that foot?

A. The discomfort as described before, just like the darned thing is sprained, still that way.

Q. Did you ever have any pain in that foot?

A. I had plenty of pain. I had what they call "flare-ups." [423]

Q. Will you describe those flare-ups and what caused them, if you know?

A. The drainage on the side with the big hole stops and the pus or whatever it is inside tries to come out somewhere else.

Q. Forms an abscess, in other words?

A. I guess you would call it that. It shows blue over on the other side.

Q. Like a boil?

(Testimony of Adolph J. Schnee.)

A. No, I don't think like a boil. It is all over an area.

Q. Does it swell? A. Oh, yes, sir.

Q. Then, what is done to relieve that?

A. It has been relieved by me just putting on a heat pack there, keeping a heat pack on it all the time, and it has been taken out with a big syringe, a needle, and I have to go down there sometimes. I went down there at the U. C. Hospital in California there every day for maybe a half a week and had a lot of trouble with it in between operations.

Q. Insert the needle and suck out the fluid?

A. Do that and cut part of the cast away and put a heat pack on it and go back and take some more of the cast off, and try to get me relieved that way.

Q. When you went to the S. P. Hospital in San Francisco, what, if anything, was done there in the way of surgical care?

A. I forget all the operations, what they were all about. [424]

Q. Prior to coming to Tucson for this case, how many surgical operations had you undergone on various parts of your body?

A. I think it was 21 or 22. I had to write them down and look it up in a book.

Q. Do you have some memorandum?

A. Twenty-first operation on the right ankle, that would be a bone graft, February 20th, this year.

Q. February 20th of this year was the twenty-first operation? A. Twenty-first operation.

(Testimony of Adolph J. Schnee.)

Q. That included all of your operations?

A. Yes, sir.

Q. Did you have some hernia operation to repair a hernia at the Southern Pacific Hospital in San Francisco?

A. That hernia was never discovered until July or August, somewhere in there of 1947, and they operated on the thing and it wasn't but, I think, nine months after I experienced trouble again and after checking, I found out the same one, I think about the same place.

Q. So you had two hernia repair operations?

A. Yes. They operated on it and discovered later on, shortly after that, it came back again.

Q. So you have a hernia now; you wear some sort of a support?

A. I do on occasion, but as long as I can sit down often enough I don't have too much pain with it. [425]

Q. Does that give you pain and trouble too?

A. It does, when I attempt to hang my foot down straight.

Q. Was there more than one operation performed on your foot at the Southern Pacific Hospital in San Francisco?

A. Yes. When we first came there in May, they operated on the right foot and they operated somewhere in August or September, and I think in November they operated on it again, and they operated on my left knee too, took out some steel sutures from the inside that time.

(Testimony of Adolph J. Schnee.)

Q. Now, how long in all were you hospitalized in the various hospitals prior to going to the University of California Hospital?

A. St. Mary's Hospital.

Q. And the Southern Pacific Hospital in Tucson and the Southern Pacific Hospital in San Francisco?

A. Yes, three, three hospitals.

Q. I say, how long were you hospitalized in all, approximately?

A. In all together?

Q. Not including the University of California.

A. You mean the extent of the hospitalization or period?

Q. The time you spent in hospitals in all?

A. About two months down here at St. Mary's Hospital, and altogether I guess about a month in the Sanitorium, the S. P. Hospital down here.

Q. You went back to the Southern Pacific Hospital—— [426]

A. Yes, I am taking it all in one; and the Southern Pacific Hospital in San Francisco. I guess altogether about ten months to a year.

Q. Under what circumstances did you leave the Southern Pacific Hospital in San Francisco, cease to be a patient in the Southern Pacific Hospital in San Francisco?

A. They told me I was no longer entitled to hospitalization.

Q. Did you receive any letter to that effect?

A. I did after I asked for it.

Q. Can you tell us what it was you were told

(Testimony of Adolph J. Schnee.)

that you had no further medical attention coming from the Southern Pacific Company? Can you tell us approximately when that was you were discharged from the Southern Pacific Hospital in San Francisco?

A. It was this year, this spring, sometime this spring.

Q. And I have the letter?

A. May or April.

Q. Was it in May, 1948?

A. No, it must have been 1949.

Q. Following your discharge from the——

A. 1949, May, 1949.

Q. May of 1949? A. Yes.

Q. Following your discharge then, from the Southern Pacific Hospital, at the time of your discharge what was your condition [427] with relation to your foot, was it still draining?

A. The foot had an open wound or hole in it and it was draining, was draining constantly, and I had especially requested any sort of hospitalization because it was paining me at that time; because sometimes the darned thing would form the proud flesh on it and wouldn't drain for maybe a day or two. I went down there and asked them to let me have some pain pills.

Q. That was the condition when you were released from the Southern Pacific Hospital in San Francisco? A. Yes.

Q. What did you do then to get yourself some surgical, medical aid?

(Testimony of Adolph J. Schnee.)

A. The minute I got that written request I went there to the U. C. Hospital because I had been there before and tried to get in it.

Q. Were you afforded an opportunity to get into the University of California Hospital?

A. I did with that written letter from the S. P. Hospital.

Q. When you showed them the letter from the Southern Pacific Hospital, they let you in the University of California Hospital? A. Yes.

Q. You went in there as a paid clinic patient, that is where you paid part of the charges? [428]

A. I was in there under the full rate.

Q. Full rate, what do you mean by that?

A. They determine the rate just for your bed and daily rate, by that they charge the medicine and everything else accordingly, operating room over that. In other words, if your rate is less than the operating room, the cost is less.

Q. How many times have you been an in-patient, that is in bed at the University of California Hospital and how many operations have been performed on you there?

A. Can I look it up? It is ten or eleven.

Q. Either ten or eleven operations on your foot?

A. Yes. I think it is eleven.

Q. Eleven operations on your foot?

A. Yes.

Q. Can you describe what they have been doing by way of operating on your foot?

(Testimony of Adolph J. Schnee.)

A. The first one, they took out all the bone that had deteriorated.

Q. Took out all the bone that had deteriorated?

A. They had to take out healthy bone too.

Q. Do you know whether or not there has developed this infection known as an osteomyelitis condition?

Mr. Thompson: I object to that on the ground it is calling for a conclusion of a lay witness.

Q. (By Mr. Gillen): All right. They took out affected bone, [429] is that correct?

A. Yes, sir.

Q. What, if anything, else did they do, if you know?

A. First, after they took out the bone they went in a second time to remove additional bone to allow it to form a granulated tissue for the bone grafts they had in mind.

Q. For bone grafts? A. Yes.

Q. By the way, did you go under general anesthetics on these occasions?

A. As I understand it, every time.

Q. You know whether or not you were put out?

A. Oh, yes.

Q. Rendered unconscious?

A. Yes. One time I had what they call nerve block. I don't know whether you call that a general or not.

Q. Where did they get the bone to use for bone graft? A. Took it out of my right hip.

(Testimony of Adolph J. Schnee.)

Q. Of course, they opened your hip to do that?

A. I'll say, yes, sir.

Q. Was that the nature of all the operations, so far as you know, the ten or eleven operations at the University of California up until February 20, 1950, cleaning out the tissue and putting in bone grafts?

A. Yes, sir. [430]

Q. Did those operations leave you with any discomfort, either before or after the ten or eleven operations, leave you with any pain?

A. I am in pain now, as far as that goes. My hip still doesn't feel right, have a little feeling in it.

Q. How about your foot?

A. My foot still feels it is sprained. That is the feeling I have in it right now.

Q. Do you have any record of the actual expenses you have been put to for medical care or surgical care or medicines, anything of that nature, in connection with your injuries that you have paid for yourself?

A. Yes, sir. I believe I put them with your papers.

Q. All right. May I have the envelope passed to the witness?

(Envelope handed to witness.)

Q. In the interest of time we will have those assembled another time and ask you about them. Let me ask you this: when you were working at the time you were injured on the railroad in 1946, what salary were you earning at that time?

(Testimony of Adolph J. Schnee.)

A. I wasn't earning a salary immediately.

Q. What pay were you getting?

A. I was self-employed.

Q. No, no. While you were working for the railroad, what was the rate of pay you were drawing, at the time you had the accident? [431]

A. At the time I had the accident, I think it was a dollar and twenty-three cents, somewhere around that, a dollar twenty-three an hour.

Q. What was your average monthly earnings?

A. The average—I didn't have at any time a full pay check, monthly pay check, so it would be hard to determine.

Q. You were paid at the Southern Pacific Company twice a month?

A. Yes. What I meant to say, Mr. Gillen, I had three promotions there in so short a time it made my pay scale different.

Q. On what rate of pay were you working at the time you had been transferred to Willcox? You had been there about ten days working before you were hurt?

A. At the rate of a dollar and twenty-three and a half cents an hour. I think it amounted to \$250 or thereabouts a month; that is without any overtime.

Q. Without any overtime? A. Yes.

Q. Have you been able to work at that or any other occupation since that time? A. No, sir.

Q. Have you earned any money since that time by employing yourself? A. No, sir. [432]

(Testimony of Adolph J. Schnee.)

Q. And that is, of course, since the 29th of August, 1946, is that correct? A. That is right.

Mr. Gillen: By the way, before we forget it, may I ask if counsel is willing to stipulate to the life expectancy of this young man. I have offered an instruction of life expectancy based on the recognized tables, at the same time not proving it I believe his life expectancy at his present age is forty years. The 1941 Standard ordinary mortality table, his life expectancy at 27 is forty years. When is your birthday? A. September 20, 1921.

Mr. Thompson: To make my position clear, I am willing to stipulate to any standard. I do not have the figures before me and would not stipulate to that amount, but if the Court states that is the standard.

Mr. Gillen: Based on any evidence he wishes to produce.

Mr. Thompson: We will state later whether or not it is admissible.

Mr. Gillen: It is always admissible, as I understand it, where permanent injury is involved.

Mr. Thompson: It isn't a case of death, it is a case where he be permanently and totally injured the rest of his life is the question.

Mr. Gillen: I think the medical men will tell you [433] something about that.

Q. Now, have you assembled your expenses you have incurred since that time? I thought you had them in your book there. I thought you kept notes as I directed you?

(Testimony of Adolph J. Schnee.)

A. The only one I have, I have with my wife and my income tax statement at my home in San Francisco.

Q. What is the present condition of the right foot with relation to whether it is healing, open and draining at this time? Just what is the condition of it at this time?

A. It is open, it is draining. I redress it myself, put clean dressings on and my wife gives me two shots of penicillin a day.

Q. Do you know what units of penicillin you receive daily?

A. It is four million units per CC. and there is in each——

Q. How many CC's of penicillin do you receive daily?

A. Two CC's, one in the morning and one at night.

Q. One CC. in the morning and one CC. at night, is that correct? A. Yes.

Q. How is that administered to you?

A. It is administered in my side, buttock.

Q. With a hypodermic needle?

A. Yes, sir.

Q. Was your wife instructed on the use of a hypodermic needle in order to save you expenses in administering this? [434]

A. She was instructed in this when she started working with the bone graft, when I was able to have three weeks between operations; but first, when

(Testimony of Adolph J. Schnee.)

I went to the U. C. Hospital they had operations coming up there every week and I would stay right there.

Q. Now, you have intervening three weeks between operations and they have instructed your wife how to give you penicillin injections, is that right?

A. Yes.

Q. Is your hip open or closed where they took the bone for bone graft? A. No, it is closed.

Q. Did they have retained and preserved in a bone bank that bone they took from your hip?

A. They have taken the bone out and put it in a bone bank.

Q. That is a place where they keep the bone alive for grafting purposes? A. That is right.

Q. Like a blood bank? A. That is right.

Q. They draw on that for your operations?

A. That is what I understand. I don't know whether they still have any or not.

Q. When are you due to return to the University of California Hospital for further bone graft operation? [435]

A. It will be three weeks from February 20th.

Mr. Gillen: I think that is all with this witness at this time with this exception, if it please the Court, I didn't want to take up the time of the Court to show him his bills and expenses.

The Court: Gentlemen of the Jury, come back at 10:00 o'clock, Monday morning.

(Jury excused.)

Mr. Gillen: There is the matter of the deposition of Dr. Francis, who has left the practice with the Southern Pacific Company and is engaged in practice in Santa Rosa, California. The deposition of Dr. Francis was noticed, Dr. Francis having agreed to come without subpoena and give a deposition, was noticed and the notice was mailed to the counsel here in Tucson, present counsel. Notice was mailed on February 27th, noticing the deposition for 10:00 o'clock, March 1, 1950, at my office in the Mills Building in San Francisco, under the rules of civil practice; the deposition was taken by my associate, Mr. Golden; it was forwarded to the Court. I have been served this morning, although counsel did call it to my attention prior to that he would offer objection, we were served this morning with objection to the deposition based on the ground they did not have sufficient time to obtain counsel to appear. I might state to Your Honor at the time this matter was set in this Court and in [436] anticipation of Your Honor's arrival here, I was in a trial in a Jury matter in San Bernardino, California, and Mr. Schnee was confined to the University of California Hospital; and I might state to Your Honor upon learning the matter was set for trial that I communicated with Mr. Thompson's office. Mr. Thompson was out of the city and I talked to Mr. Henderson and explained my predicament to Mr. Henderson and asked if it would be agreeable providing we had permission of the Court for this case to be postponed for a day or two as there were some

depositions I desired to have before the Court. Mr. Henderson said he would see if he could obtain permission and advised me very courteously and promptly he was unable to obtain permission of his clients to do that, although since I have learned there was another Southern Pacific case that was ready to go. However, I then asked if I might have the stipulation from Mr. Henderson as to taking depositions. Mr. Henderson suggested I take the matter up with Johnson, Rickson, Freeman and Johnson in Alameda County, which was the firm originally appearing in the Northern District of California, to see if some arrangement could be arrived through that office of taking depositions by stipulation. I did that, Your Honor, and Mr. Freeman of that firm was very willing to accommodate everybody and anybody at the depositions but could not himself get authority from the legal department of the Southern Pacific, couldn't find the men to do it. So we went ahead the best we [437] could. I got Judge Goodman of our District who shortened the time on one notice for the taking of the deposition of the medical librarian of the Southern Pacific Hospital to get their record here. We sent this notice to counsel. It was mailed, as I say, on the 27th of February for a deposition to be taken on the 1st of March. Also we obtained an order from Judge Goodman and took the depositions of Doctor Inman, University of California Hospital, and Doctor Grigorieff also, who operated on this boy, and that deposition was attended by Mr. Freeman, Mr. Free-

man probably at the request of local counsel. Now, he is objecting to the deposition being admitted, the deposition of Dr. Francis, on the ground of the shortness of time to obtain counsel to set in for them. We submit, may it please Your Honor, under the circumstances we feel we should be allowed to have the vitally important testimony of the original surgeon who worked on this boy before the Court. It is prohibitive from the standpoint of expense and impossible to get Dr. Francis to leave his practice. He could do so with great reluctance. He is a pretty busy man.

Mr. Thompson: Your Honor, on that, of course, the first two depositions I knew about well before the deposition was to be taken and finally got someone to go over and appear in the deposition. We did have an appearance. We are not going to make any objection to those depositions. As to Dr. Francis, I did not learn the matter that his deposition was contemplated [438] until the morning of March 1st, so far as we are concerned. It came into my office late on February 28th while I was engaged in this trial. We were in the act of coming to this courtroom to engage in this trial when I learned it was to be taken in San Francisco. I had no opportunity to communicate with any attorneys to go over there and examine Dr. Francis on our behalf. This case has been pending in this Court a long time and counsel certainly had ample opportunity to take any depositions a long time before this trial was in progress. I think where the rule provides for a rea-

sonable time means what it says. Counsel is entitled to that and we shouldn't be faced with a deposition where we didn't have opportunity to cross-examine the doctor or bring out any additional facts regarding what he testified to.

I say sincerely to the Court, I always hate to take the position that is technical but we think the deposition is not admissible.

Mr. Gillen: May I say to Your Honor, the last time I pursued an investigation in this area concerning this case Dr. Francis was still, according to my information, practicing in Tucson and was attached to the Southern Pacific staff. It wasn't until after I learned this case was to be tried and had a representative of mine down here to engage in some work that we discovered Dr. Francis had left Arizona altogether and was practicing in Santa Rosa; didn't know that as a matter of fact [439] when I first talked to Mr. Henderson on long distance phone. As a matter of fact, my man was going to subpoena Dr. Francis and we learned that Dr. Francis had since moved his activities from Tucson to Santa Rosa.

The Court: There is no different subpoena power made in this type of case than any other case. I won't rule on that now, I will rule on it at the time it comes up.

(Whereupon a recess was taken at 5:00 o'clock p.m. until 9:30 o'clock a.m. Monday, March 6th.)

The Court: Gentlemen of the Jury, I have been hearing arguments of counsel in your absence as to legal liability in this case and in my opinion there is none, therefore I instruct you to return a verdict for the defendant.

I appoint Mr. Otis as foreman. The verdict is returned at my direction, gentlemen, so the responsibility is mine.

The clerk will read the verdict.

Judgment will be received and filed and judgment entered for the defendant. Gentlemen of the Jury, thank you for your service. You are now discharged from further service on this case. [440]

Certificate

State of Arizona,
County of Pima—ss.

I, Fred L. Baker, do hereby certify that I was duly sworn as official Court Reporter in the United States District Court, District of Arizona, and that as such official Court Reporter I attended the trial in the foregoing entitled causes; that I took down in shorthand all the oral testimony adduced, and proceedings had; that such shorthand was reduced to writing under my supervision, and that the foregoing typewritten matter contains a full, true and correct transcript of my shorthand notes so taken by me as aforesaid.

/s/ FRED L. BAKER,
Official Court Reporter.

[Endorsed]: Filed May 1, 1950.

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said court, including the records, papers and files in the case of Adolph J. Schnee, Plaintiff, vs. Southern Pacific Company, a corporation, Defendant, numbered Civ-486 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the civil docket entries and minute entries are true and correct copies of the originals thereof remaining in my office in the city of Tucson, State and District aforesaid.

I further certify that said original documents, and said copies of the civil docket entries and of the minute entries, constitute the entire record on appeal in said case, as designated in the Appellant's Designation filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Civil Docket Entries.
2. Record Transferred from Northern District of California, filed January 3, 1949.
3. Praecipe for Dismissal Without Prejudice,

filed June 23, 1949.

4. Defendant's Motion to Set, filed August 10, 1949.

5. Withdrawal of Praeipe for Dismissal Without Prejudice, filed August 15, 1949.

6. Plaintiff's Motion to Set, filed November 14, 1949.

7. Deposition of Adolph J. Schnee, filed January 9, 1950.

8. Praeipe for Summons, filed February 27, 1950.

9. Deposition of Henrietta Roher, filed February 28, 1950.

10. Deposition of Verne T. Inman and Paul A. Grigorieff, filed March 1, 1950.

11. Jury List, filed February 28, 1950.

12. Praeipe for Subpoena Duces Tecum to Custodian of Records, St. Mary's Hospital, filed March 1, 1950.

13. Deposition of Dr. J. Donald Francis, filed March 2, 1950.

14. Defendant's Objection to Deposition of Dr. J. Donald Francis, filed March 4, 1950.

15. Plaintiff's Requested Instructions, filed March 6, 1950.

16. Plaintiff's Additional Requested Instructions, filed March 6, 1950.

17. Defendant's Requested Instructions, filed March 6, 1950.

18. Minute entries of February 28, March 1, 2, 3, 4, and 6, 1950 (proceedings of trial).

19. Verdict, filed March 6, 1950.

20. Plaintiff's exhibits 4, 5 and 6 in evidence. (Plaintiff's exhibits nos. 1, 2 and 3 for identification are defendant's exhibits J, K and L in evidence.)

21. Defendant's exhibits A, B, C-1, C-2, C-3, C-4, C-5, D-1, D-2, D-3, D-4, D-5, F, G, H, J, K, L, and M in evidence; and Defendant's exhibits E and I for identification.

22. Judgment filed March 7, 1950.

23. Subpoena for Mrs. Bonnie Tendler, filed March 21, 1950.

24. Notice of Appeal to Court of Appeals, filed April 5, 1950.

25. Cost Bond on Appeal, filed April 5, 1950.

26. Designation of Record on Appeal, filed April 5, 1950.

27. Reporter's Transcript, Volumes I and II, filed May 1, 1950.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$7.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 10th day of May, 1950.

WM. H. LOVELESS,
Clerk.

By /s/ CATHERINE A. DOUGHERTY
Chief Deputy.

[Endorsed]: No. 12547. United States Court of Appeals for the Ninth Circuit. Adolph J. Schnee, Appellant vs. Southern Pacific Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: May 12, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12547

ADOLPH J. SCHNEE,

Appellant.

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Appellee.

DESIGNATION OF RECORD

Pursuant to Rule 19 (6) of the Rules of Practice of the above-entitled court, the appellant hereby designates the following parts of the record as material to the consideration of the appeal:

- 1) Court Docket Entries.
- 2) Record Transferred from Northern District of California, filed January 3, 1949.

- 3) Minute entries (proceedings of trial).
- 4) Verdict, filed March 6, 1950.
- 5) Plaintiff's exhibits.
- 6) Defendant's exhibits.
- 7) Judgment, filed March 7, 1950.
- 8) Notice of Appeal, filed April 5, 1950.
- 9) Cost Bond, filed April 5, 1950.
- 10) Designation of Record on Appeal, filed April 5, 1950.
- 11) Reporter's Transcript, Volumes I and II.
- 12) Statement of Points.
- 13) This designation.

Dated this 15th day of May, 1950.

/s/ LESLIE C. GILLEN,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 19, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

Pursuant to Rule 19 (6) of the Rules of Practice of the above-entitled court, the appellant hereby states the points on which he intends to rely, as follows:

- 1) The District Court erred in directing a verdict against plaintiff and in favor of defendant.
- 2) The District Court erred in refusing to submit the case to the jury.

3) The District Court erred in holding that as a matter of law plaintiff was not entitled to recover.

4) The District Court erred in holding and ruling that plaintiff's injuries were not proximately caused by negligence of the defendant.

5) The District Court erred in entering final judgment in favor of defendant.

6) The District Court erred in directing a verdict for defendant upon motion of the defendant.

7) The evidence introduced at the trial was of such character that it clearly indicated and established that plaintiff was injured as the proximate result of defendant's negligence and for that reason the action of the trial court in instructing the jury to return a verdict in favor of the defendant and against plaintiff was and is contrary to the law and evidence.

Dated this 15th day of May, 1950.

/s/ LESLIE C. GILLEN,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 19, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION

Come now the parties hereto by their counsel, Leslie C. Gillen, attorney for plaintiff, and Messrs. Knapp, Boyle, Bilby & Thompson, attorneys for defendant, and stipulate that subject to the approval of the court, the original exhibits in the above-entitled matter may be received and considered by the Court in their original form without the necessity of reproduction.

Dated this 3rd day of June, 1950.

LESLIE C. GILLEN,

EDWARD W. SCRUGGS,

By /s/ EDWARD W. SCRUGGS,
Attorneys for Plaintiff.

KNAPP, BOYLE, BILBY &
THOMPSON,

By /s/ [Indistinguishable.]
Attorneys for Defendant.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,

/s/ W. E. ORR,
United States Circuit Judges.

[Endorsed]: Filed June 8, 1950.

